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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 112.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY, APPELLANT,

vs.

THE TOWNSHIP OF CANE CREEK, LANCASTER COUNTY, SOUTH CAROLINA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED MARCH 30, 1891.

(14,550.)

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1 THE UNITED STATES OF AMERICA, *District of South Carolina, Fourth Circuit,* } *To wit:*

In the Circuit Court.

At a circuit court of the United States for the fourth circuit, in and for the district of South Carolina, begun and holden at Charleston, in the district aforesaid, on the first Monday in April, 1890, before the Honorable Hugh L. Bond and the Honorable Charles H. Simonton, judges of the said United States court for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

THE UNITED STATES OF AMERICA, *District of South Carolina, Fourth Circuit.*

In the Circuit Court. Equity.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY, Complainant, *against* THE TOWNSHIP OF CANE CREEK, in the County of Lancaster and State of South Carolina, and The Boston Safe Deposit and Trust Company, Defendants.

2 Be it remembered that heretofore, to wit, on the 8th day of November, in the year of our Lord one thousand eight hundred and eighty-nine, came into court the complainant, The Massachusetts and Southern Construction Company, by its solicitors, Lord and Hyde, and filed the following bill; which bill is in the words and tenor following:

In the United States Circuit Court for the District of South Carolina, November Term, 1889.

THE MASSACHUSETTS & SOUTHERN CONSTRUCTION COMPANY *vs.* THE TOWNSHIP OF CANE CREEK, in the County of Lancaster and State of South Carolina, and The Boston Safe Deposit & Trust Company. Equity.

To the judges of the circuit court of the United States for the district of South Carolina:

1. The Massachusetts & Southern Construction Company, a corporation duly organized under the laws of the State of Massachusetts and a citizen of Massachusetts, bring this their bill against the Township of Cane Creek, a body corporate, in the county of Lancaster and State of South Carolina, a citizen of said State of South Carolina, and The Boston Safe Deposit & Trust Company, a corporation

duly organized under the laws of the State of Massachusetts, and a citizen of said State, joined herein as a formal defendant merely, but which is without any interest whatever in the controversy which forms the subject-matter of this bill, which said controversy is wholly between the complainant and the defendant township; and thereupon your orator complains and says that the Boston Safe Deposit & Trust Company is now the custodian of certain bonds, held by it in trust for the benefit of the Massachusetts & Southern Construction Company, which were legally issued by said Cane Creek township in aid of the Charleston, Cincinnati & Chicago Railroad Company, under and by virtue of the following statutes of the State of South Carolina: "An act to incorporate the Georgetown & North Carolina Narrow Gauge Railroad Company", approved March 4th, 1878, section 4 of which provided that for the purpose of creating the capital stock of said company, "subscriptions thereto may be received payable in money, bonds, or other
3 valuable credits, lands, labor, or material necessary in the construction of said road, in such manner and on such terms as may be agreed upon between said company and such subscribers." Said act was amended by an act approved February 9th, 1882, and also by further amendment to said act, approved December 21st, 1883, which provides in section eleven thereof as follows: "That it shall and may be lawful for any county or township interested in the construction of said railroad, to subscribe to its capital stock such sums as a majority of its voters voting at an election held for that purpose may authorize the county commissioners to subscribe, which subscription shall be made in seven per cent. coupon bonds, payable twenty-five years after the date thereof, and to be of the denomination of one hundred, five hundred, and one thousand dollars," and enacted in section 14 thereof that for the purpose of and to carry out the provisions of this act, "such counties and townships as shall vote for subscription are hereby created bodies politic and corporate under their respective names, and are vested with powers necessary for carrying out the provisions of this act. And the commissioners of any county so incorporated, or of any county in which shall be situated any township so incorporated, are hereby declared to be the corporate agents of such county or township." And, also, by a further amending act, approved December 22, 1885, whereby the name of said railroad company was changed to "The Charleston, Cincinnati & Chicago Railroad Company," and conferring upon the said last-named company all the rights, powers, privileges, franchises, and immunities conferred upon and enjoyed by the said Georgetown & North Carolina Narrow Gauge Railroad Company.

2. That at an election duly petitioned for, ordered, and held on the 26th day of June, 1886, pursuant to the provisions of the foregoing act and amendments thereto, the qualified voters of Cane Creek township voted a subscription of $19,000 to the capital stock of said railroad company, payable in the bonds of said township. And thereupon, the board of county commissioners for said Lancaster county, then in office, as corporate agents of said township, made

the subscription to the capital stock of said railroad company so authorized and voted, and said subscription was accepted by said railroad company; and said township has since, by its duly authorized agents, voted upon said stock at a meeting or meetings of the stockholders of said railroad.

4 3. That, upon the faith of the foregoing and other like subscriptions to the capital stock of said railroad company, your orator undertook and agreed with said railroad company to construct its railroad, so authorized by its charter, through said township along the route designated, and agreed to receive as part payment the bonds of said township so subscribed. And it was agreed by said township, said commissioners, and said railroad company, that the bonds issued by said township under said subscription should be delivered to your orator in part payment for the building of said road, and thereafter, to wit, on the first day of July, A. D. 1887, the said township, acting by said commissioners, issued its bonds hereinafter more fully described; and it was thereupon agreed by and between the township, the commissioners, the railroad company, and your orator, that your orator should proceed to construct the road through said township, and the township of Gill's Creek and Pleasant Hill in said county, relying upon said bonds in part payment therefor, and that said bonds should be deposited in the hands of a trustee to be paid over to the construction company from time to time, as the construction of the road progressed; and by and in accordance with said agreement said bonds were thereupon deposited with the Boston Safe Deposit & Trust Company, to be held by it in trust for the benefit of your orator until it should have completed, in part or in whole, the aforesaid railroad through said townships, which completion was to be evidenced by a certificate, signed by the engineer of Charleston, Cincinnati & Chicago Railroad Co., and the majority of the board of commissioners of said county, attested by the clerk thereof with the corporate seal of Lancaster county; and that thereupon the said trustee should immediately pay over to your orator said bonds, in part or in whole, according to the progress of the road, to wit, when the track should be laid and the railroad ready for operation between Rock Hill and Thornwell place in said township of Cane Creek $10,000 par value of said bonds of said township should be delivered by said trust company, and when said track should be laid in the remaining portion of said Cane Creek township the remaining $9,000 par value of said bonds should be likewise delivered by said trust company; that, in accordance with the aforesaid agreement, an indenture of trust was executed by and between the board of commissioners of said

5 county of Lancaster, as corporate agents of said defendant township, and also as corporate agents of said Gill's Creek township and said Pleasant Hill township, and the aforesaid trust company, on the 30th day of November, 1887, a copy of which is hereto annexed, marked Exhibit "A;" that the bonds of said township so issued and placed in the hands of said trustees were as follows, to wit: 190 bonds of the denomination of one hundred dollars each, and all bearing interest at the rate of seven per cent.

per annum, the principal thereof payable twenty-five years from date, and of the aggregate par value of nineteen thousand dollars. A copy of one of said bonds with one of the interest coupons thereon, omitting the numbers, signatures, and amounts thereof, is hereto attached, marked Exhibit "B," of this bill; that said defendant trust company accepted said trust, received said bonds as such trustee, and duly endorsed the trustee's certificate thereon.

4. And thereupon your orator, believing that it might safely rely upon receiving payment from or out of the bonds so held in trust for it, and believing that the defendant township and its corporate agents would carry out in good faith their aforesaid agreement, and would not do anything to prevent or hinder your orator from coming into the full possession of the bonds, so held in trust for it whenever the aforesaid road should be completed through said township, proceeded to build said railroad through said Cane Creek township, in accordance with their aforesaid contract with the Charleston, Cincinnati & Chicago Railroad Company, and did then and there fully build and complete the same through said township at great expense to itself; that prior to the 18th day of August, 1888, your orator had completed the entire road through said defendant township and the same was on that day fully examined and accepted by the railroad commission for the State of South Carolina pursuant to the laws of said State, and said railroad commission thereupon made its certificate authorizing said railroad company to open said railroad for public use on and after August 20, 1888, and that in accordance with said certificate the said railroad company thereupon accepted said railroad and put the same in operation and have been operating the same ever since. A copy of said certificate of said railroad commission is hereto annexed as Exhibit "C."

5. And the engineer of said railroad company, to wit, on the 20th day of August, 1888, and again on the 12th day of January, 1889, in accordance with the terms of the aforesaid agreement cer-
6 tified to the said Boston Safe Deposit & Trust Company, trustees as aforesaid, that the said railroad of the Charleston, Cincinnati & Chicago Railroad Company through said Cane Creek township was completed with the track laid and the railroad ready for operation in accordance with the terms of said agreement; and the same was presented to the said board of county commissioners with a request that the same be certified to said defendant trustee company pursuant to the aforesaid contract, so that the Boston Safe Deposit & Trust Company might safely deliver to your orator the bonds of the said township held by it. Yet said board fraudulently refused to certify the same; a copy of which said engineer's certificate and said writing are hereto appended, marked Exhibit "D" of this bill.

6. Your orators are informed and believe that the courts of the State of South Carolina held, as your orators believe erroneously, after the issuing and placing of these bonds with the Boston Safe Deposit & Trust Company, and prior to the presentation of the aforesaid certificate, that bonds subscribed and issued by a certain other township in said State in aid of another railroad company

were not legal obligations of such township. Thereupon the General Assembly of the State of South Carolina, on the 22nd day of December, A. D. 1888, adopted an act in the following terms: "An act to provide for the payment of township bonds issued in aid of railroads in this State. Whereas, certain townships in this State have by their vote expressed their willingness to subject themselves to taxation for the purpose of paying bonds issued by them in aid of certain railroads, and whereas, by reason of a defect in the acts authorizing the issue of said bonds they have been declared invalid; now, therefore, for the purpose of carrying into effect the expressed will of the people of said townships:

"SECTION 1. Be it enacted by the senate and the house of representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same: That the township bonds heretofore issued by county commissioners as the corporate agents of any township in this State in aid of any railroad, by vote of the inhabitants of said township, are hereby declared to be debts of said townships respectively, having authorized the issue of the same. And the interest and principal thereof shall be paid according to the terms of said bonds or debt by the assessment, levying, and collection of an annual tax upon the taxable
7 property in said townships so far as may be necessary, in like manner, and by the same county officials, as the tax levied for county bonds in aid of railroads is assessed, levied, and collected; said tax to be known and styled in the tax books as the township railroad tax, and when collected shall be paid over by the treasurer of the county to the holders of said bonds, as the interest thereon may become due, and according to the terms thereof. All dividends received by or for said townships on stock in railroad companies which have been aided by the said township bonds or debt shall be applied by the county commissioners of the county in which said townships are respectively situated, primarily towards the payment or retirement of said bonds or debt, and the surplus shall be expended in the improvement of the highways within the territorial limits of said township.

"SECTION 2. That no tax shall be levied under the provisions of this act to pay the interest on any township bonds until the railroad in aid of which they were subscribed shall be completed through such township and accepted by the railroad commissioners, nor shall this act be so construed as to authorize the levy and collection of any tax to pay the interest that may have accrued on such bonds before the completion of such railroad, as provided in this section: Provided, that in all townships where taxes have been assessed or collected contrary to the provisions of this act, the county treasurers of the respective counties are hereby required, where such have been paid, to refund the same, and where they have not been paid, to allow a rebate to the extent of such taxes.

"SECTION 3. That this act shall take effect immediately upon its approval." And said act was duly approved on said 22d day of December, 1888.

And your orator says that in and by said last-named act, if any

doubt theretofore existed as to the validity of said bonds and the debt thereby represented, which the complainant denies, the defendant township thereby became and was indebted to the persons entitled to the possession of said bonds in a sum equal to the amount represented by said bonds, according to the terms named in said bonds; that in and by said act, even if said bonds and the indebtedness thereby represented *was* not binding upon said defendant township, which the complainant denies, yet by virtue of said act a legal and valid debt was imposed upon it equal in amount to the sum represented by the aforesaid bonds, and that said debt
8 was and is due and payable to the parties who would have been entitled to claim under said bonds, if said bonds had been legal and valid instruments, and your orator says that whether said bonds be regarded as legal and valid instruments from the beginning, or whether they be regarded as furnishing evidence of the indebtedness due from the township under the act of 1888, the possession of said bonds is a matter of importance to the complainants, in order that they may be enabled to efficiently prosecute and enforce their legal rights against the said township.

7. And your orator thereupon again presented to the chairman of said board of commissioners, as corporate agents aforesaid, the aforenamed certificate for his endorsement, and he again refused to officially endorse the same.

8. Your orator further shows that the highest court in the State of South Carolina, on or about the 15th of April, 1889, in the cases of State *ex rel.* Charleston, Chicago & Cincinnati Railroad Company *v.* Whitesides, chairman, *et al.*, and State *ex rel.* Dickinson *v.* Neeley Co., treasurer, *et al.*, held and declared the effect of the act of 1888 to be as above stated, and held that the debt thereby imposed upon said township was a valid and subsisting obligation, the payment of interest and principal of which should be enforced by taxation. And your orator thereupon applied to the board of county commissioners, as corporate agents aforesaid, to take the necessary steps to have the trust executed and the possession of the aforesaid bonds surrendered to it.

9. And your orator further avers, that the Boston Safe Deposit & Trust Company, being advised from other evidence and from the aforesaid written statement of the county commissioners of said county of Lancaster that the complainant had fully complied with its contract in the premises, and ought to have said bonds surrendered to it on, to wit, the 24th day of April, 1889, caused a notice to be sent to the said board of county commissioners, as corporate agents of said township, alleging its belief that the said bonds should be surrendered, and expressing its intention to pay over the same to the complainant unless said board within a reasonable time thereafter should offer sufficient reasons why it should not do so; but said commissioners, instead of offering any sufficient reason why said Boston Safe Deposit and Trust Company should not execute its trust, as suggested in its notification, immediately,
9 to wit, on the 1st day of May, 1889, made reply thereto, objecting to the delivery of said bonds to your orator, and de-

manded that said defendant trust company should either hold said bonds or return them to said commissioners of Lancaster county, and leave your orator to such legal remedy as it might have, to get possession of said bonds or recover the debt referred to in said act of 1888. A copy of said notification and reply thereto are appended, marked Exhibit "E" of this bill.

In consequence of the said objections and other illegal proceedings hereinbefore recited, said defendant trust company has not paid over said bonds.

10. Your orator avers that upon its completion of said railroad through said township, said railroad company duly assigned and transferred to it all of said bonds, and the debt thereby represented, as part payment for the construction of said railroad, and that the subject-matter of this controversy and the bonds and the debt claimed by the complainant exceed in amount the value of nineteen thousand dollars.

11. Your orator further avers, that it well and truly fulfilled all of the duties and obligations which it assumed by virtue of its said agreement, so far as the same relates to the building of the said railroad through said township of Cane Creek; that in good faith it procured from said railroad company certificates running to said defendant township, representing the full amount of said capital stock of said railroad company, so subscribed for, which it has always been ready and willing to deliver to said defendant township, and is now ready to deliver to it, whenever it will consent to have said bonds paid over to your orator, and has placed said certificates of stock in the hands of said defendant trust company for the benefit of said township, and to be delivered to it whenever said bonds can be paid over to the plaintiff; and that it was entitled to receive said bonds on and after, to wit, the 20th day August, 1888, when the balance of said railroad through said township was accepted by the said railroad commission, and said certificate of the said engineer, showing the completion of the said railroad, was presented to said board of county commissioners for certification according to the terms of said trust indenture; and the refusal of the said board to certify as aforesaid, and that it has ever since been entitled to have said bonds paid over to it by said defendant
10 trust company. And your orator further alleges that the said trust company has no interest in said bonds or the debt thereby represented, not even for its services, the same having been fully paid, and has been ready and willing, and is now ready and willing, to execute said trust by paying over said bonds and delivering the stock which it holds for that purpose, whenever it may be protected in so doing. But, by reason of the said demand made by the said county commissioners, with reference to the delivery of said bonds, and insinuations of injury to its reputation and standing as a corporation authorized to administer trusts, and to hold trust funds as a part of its corporate powers, it hesitates to deliver said bonds to the complainant.

12. Your orator further shows, that it has expended, and is now expending, in the construction of said railroad a very large sum of

money, to wit, six million dollars; that it has done so relying for reimbursement upon the bonds to be transferred and delivered to it in part payment thereof by the said defendant township, and certain other townships of the State of South Carolina, whose bonds are also deposited with said defendant trust company upon the like trust hereinbefore set forth as to the bonds of the defendant township; that said defendant trust company, on the same grounds upon which it has heretofore refused, and still refuses, to deliver the bonds of said Cane Creek township, has refused and still refuses to deliver the bonds of any of said townships; that the complainant is thus deprived of the means of realizing the large amount of money heretofore expended by it, as aforesaid, in the construction of said railroad, and that unless granted the relief hereinafter prayed for by this court, it is in danger of being financially embarrassed, and of being irreparably injured through inability to punctually meet its obligations to its creditors.

To the end, therefore, that your orator may obtain the relief to which it is justly entitled in the premises, it now prays the court as follows:

First. To grant it due process by subpœna directed to said Cane Creek Township and said Boston Safe Deposit & Trust Company, defendants hereinbefore named, requiring and commanding each and every of them to appear herein and answer the several allegations in this your orator's bill contained.

Second. That pending said suit, and until further order of
11 the court, the said trust company be ordered to deliver and pay over said bonds to the complainant.

Third. That the said defendant township may be required to specifically perform its aforesaid agreements by assenting to the delivery of said bonds now in the hands of said defendant trust company to the complainant.

Fourth. That said defendant trust company be ordered to pay over and deliver said bonds to the complainant.

Fifth. And for such further and other relief as may be just and equitable.

12 EXHIBITS.

EXHIBIT A.

Whereas, in accordance with the provisions of section 11, 12, 13 and 14 of the amendment to the charter of the Georgetown and North Carolina Narrow Guage Railroad Company, granted and ratified by the General Assembly of the State of South Carolina on the 19th day of December A. D. 1883, and approved December 21st, A. D. 1883, providing that it shall and may be lawful for any county or township interested in the construction of said railroad to subscribe to its capital stock. And

Whereas, the General Assembly of South Carolina on the 22nd day of December, A. D. 1885, passed and ratified an act entitled "An act to amend an act entitled 'An act to incorporate the George-

town and North Carolina Narrow Guage Railroad Company,' and the acts amendatory thereof," by which the words "Georgetown and North Carolina Narrow Guage" were stricken out of the charter of the Georgetown and North Carolina Narrow Guage Railroad Company, and the words "Charleston, Cincinnati and Chicago" were inserted therefor, whereby the name of said corporation became "The Charleston, Cincinnati and Chicago Railroad Company" and

Whereas, on the 26th day of June A. D. 1886, the township of Gill's Creek, in the county of Lancaster, State of South Carolina voted a subscription of thirty-nine thousand (39,000) dollars, and the townships of Cane Creek and Pleasant Hill in said county each voted a subscription of nineteen thousand (19,000) dollars, in seven per cent. annual interest coupon bonds to the capital stock of the Charleston, Cincinnati and Chicago Railroad Company. And

Whereas, the said "The Charleston, Cincinnati and Chicago Railroad Company" was consolidated with the "Charleston, Cincinnati and Chicago Railroad Company" at a meeting of its directors held September 10th, A. D. 1886, ratified and confirmed by its stockholders at a meeting held at Columbia, S. C. September 14th, A. D. 1886, and said "Charleston, Cincinnati and Chicago Railroad Company" was duly organized at Charleston S. C. on the 30th day of September, A. D. 1886, as provided by law. And

Whereas, the said subscription hereinbefore named was recorded by order of the board of commissioners of said county, as the corporate agent of said townships upon the records of said county in the office of said board of commissioners, and subscribed by the chairman of said board upon the books of the said railroad company.

Now, therefore, this memorandum of agreement, made and entered into on this 30th day of November A. D. 1887, by and between the board of commissioners for the county of Lancaster, as the corporate agent of the townships of Gill's Creek, Cane Creek and Pleasant Hill in said county, and the Boston Safe Deposit and Trust Company, of the city of Boston and State of Massachusetts, witnesseth:

That for the purpose of more fully and satisfactorily carrying out the understandings, agreements, and purpose of the said vote and subscription of the said townships of Gill's Creek, Cane Creek and Pleasant Hill, in said county of Lancaster, according to the time, tenor, intent and spirit of the same, as expressed in the terms submitted to, and indorsed by, the people of said townships at the polls, the board of commissioners of Lancaster county, as the corporate agent of said townships, does hereby transfer, assign, and deliver to the said Boston Safe Deposit and Trust Company, trustee, the within described and mentioned thirty-nine thousand (39,000) dollars of seven per cent. annual interest coupon bonds of the township of Gill's Creek, and the within described and mentioned nineteen thousand (19,000) dollars of the township of Cane Creek, and nineteen thousand (19,000) dollars of the township of Pleasant Hill, in said Lancaster county, upon the following trust, to wit: That

whenever the engineer of the Charleston, Cincinnati and Chicago Railroad Company and a majority of the board of commissioners of said county attested by the clerk thereof with the corporate seal of Lancaster county shall over their hands certify to the said Boston Safe Deposit and Trust Company, trustee aforesaid, that the track is laid and the railroad is ready for operation upon each of the following-described sections, the trustee shall immediately pay over to the Massachusetts and Southern Construction Company the several amounts of the said seven per cent. coupon bonds of the townships aforenamed, as hereinafter set forth and in the order hereinafter set forth.

When the track is laid and the railroad is ready for operation between Rock Hill and Thornwell place, in said township of Cane Creek, ten thousand (10,000) dollars par value of said bonds of said township shall be delivered by said trust company to said railroad company; and when the said track is laid in the remaining portion of Cane Creek township, nine thousand (9,000) dollars par value of said bonds shall be likewise delivered. When the track is laid and the railroad is ready for operation between the town of Lancaster and the township line of Cane Creek, twenty thousand (20,000) dollars par value of said bonds of the township of Gill's Creek shall be delivered by said trust company to said railroad company, and when the track is laid in the remaining part of said township of Gill's Creek, southward, the remaining nineteen thousand (19,000) dollars par value of said bonds shall be delivered by said trust company to said railroad company. When the track is laid and the railroad is ready for operation between Salem Church in Pleasant Hill township and the township line of Gill's Creek, ten thousand (10,000) dollars par value of the bonds of the said township of Pleasant Hill shall be delivered by said trust company to said railroad company, and when the track is laid in the remaining portion of Pleasant Hill township, southward, nine thousand (9,000) dollars par value of said bonds shall be delivered by said trust company to said railroad company.

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But before the said trustee shall deliver the said bonds as aforesaid, the coupons that have matured upon the same shall be detached and surrendered to the said board of commissioners for cancellation, and the said bonds shall not draw interest except from the date of the certificates signed by the said engineer of the Charleston, Cincinnati and Chicago Railroad Company and a majority of the board of commissioners of the county of Lancaster.

Provided further, that the Massachusetts and Southern Construction Company, upon receiving the said seven per cent. annual interest coupon bonds, shall procure to be issued certificates entitling the townships of Gill's Creek, Cane Creek and Pleasant Hill, in said county of Lancaster, to an amount of capital stock at par value in the Charleston, Cincinnati and Chicago Railroad Company, equal to the amount of said bonds so delivered.

In consideration of the premises and the further consideration of one (1) dollar to it in hand paid by the said board of commissioners of Lancaster county, the said Boston Safe Deposit and Trust Com-

pany does hereby accept said trust and agrees to and with the board of commissioners of Lancaster county to perform all and singular the duties appertaining thereto with all ordinary care and diligence, and further agrees to be responsible for the safety of all said bonds while they remain in its possession; and if for any cause the Massachusetts and Southern Construction Company, or the Charleston, Cincinnati and Chicago Railroad Company, has not completed said railroad within Lancaster county, by the first day of July, A. D. 1889, further agrees to then deliver all of said bonds then remaining in its possession to the board of commissioners of Lancaster county, or to such parties as they may name, free and clear of the provisions of this trust.

In witness whereof, the said board of commissioners for the county of Lancaster, as the corporate agent of the townships of Gill's Creek, Cane Creek and Pleasant Hill, has caused these presents to be signed by a majority of its board, and its corporate seal to be hereto affixed, and the said Boston Safe Deposit and Trust Company has also hereunto affixed its name and seal, on this 30th day of November, A. D. 1887.

A. H. PERKINS,
F. B. MOBLEY,
H. N. CLYBURN,
Majority of Board of Commissioners.
BOSTON SAFE DEPOSIT AND TRUST COMPANY,
By F. M. STONE, *President.* [SEAL.]

Attest: EDWARD P. BOND, *Secretary.*

In presence of—(words "attested by the clerk thereof with the corporate seal of Lancaster county" and words "procured to be" interlined before signing. Words "either or" and words "without regard to the order in which said sections are named whether said sections are built from the north southerly or from the south northerly" stricken out and words "and in the order hereinafter set forth" inserted before signing—
IRA B. JONES.

In presence of—
J. W. SHEPARD.
H. L. HEATHFIELD.

16 EXHIBIT "B."

$000. UNITED STATES OF AMERICA. $000.

No. ——.

Cane Creek township,

Lancaster county, South Carolina.

The township of Cane Creek, in the county of Lancaster, in the State of South Carolina is justly indebted to —— ——, or bearer,

in the sum of —— dollars and will pay the same to the holder hereof on the first day of July, in the year of our Lord one thousand nine hundred and twelve, at Lancaster, South Carolina, upon the surrender of this bond. The interest, at the rate of seven per cent. per annum, to be paid annually, on the first day of July in each and every year ensuing the date hereof at Lancaster, South Carolina, upon the surrender of, and in accordance with the terms of the interest warrants or coupons hereto annexed.

This bond is issued in pursuance of the power and authority granted by sections 11, 12, 13 and 14 of an act of the General Assembly of the State of South Carolina, approved on the twenty-first day of December, A. D. 1883, entitled "An act to amend an act entitled 'An act to incorporate the Georgetown and North Carolina Narrow Gauge Railroad Company' and the acts amending the same, and to provide for subscriptions thereto."

The board of commissioners of Lancaster county, representing the township of Cane Creek in the county aforesaid, as its corporate agents, having first ascertained the sense of the qualified voters to favor a corporate subscription, by said township to the capital stock of said railroad company, by an amended act ratified December 22d, A. D. 1885, known as "the Charleston, Cincinnati and Chicago Railroad Company" and subsequently consolidated with the "Charleston, Cincinnati and Chicago Railroad Company as provided by law and ratified and confirmed by the General Assembly of South Carolina, December 24th, A. D. 1886, and said vote for subscription being recorded upon the records of said county of Lancaster and subscribed by said board upon the books of said railroad company, have caused this bond to be issued to pay the subscription of the said township of Cane Creek to the said Charleston, Cincinnati and Chicago Railroad Company," and the whole is done under the authority conferred by and in conformity with, the provisions of said sections of the acts aforesaid.

17 This bond is not valid unless the certificate endorsed hereon is signed by the trustee.

In testimony whereof the board of commissioners for the county of Lancaster, as the corporate agents of said township, have caused this bond to be signed and to be countersigned by the clerk of the board and attested by the seal of said county of Lancaster, on this first day of July, A. D. 1887.

—— ——, } *Board of Commissioners*
—— ——, } *of Lancaster County.*
—— ——, }

—— ——,
Clerk of Board of the County Commissioners.

UNITED STATES OF AMERICA.

Number ——.

Cane Creek township,
(Lancaster county).

PER 7 CENT
BOND.

South Carolina.

——

$800.

——

Principal due
1912
Interest payable
July 1st in
—Lancaster—
Lancaster county, South Carolina.

Trustee's Certificate.

The within bond is one of a series amounting in the aggregate to nineteen thousand dollars delivered to us as trustee under trust deed dated — day of ——, 1887, signed in duplicate one of which is on file in the office of the Boston Safe Deposit & Trust Company of Boston, Mass. and the other on file in the office of the county commissioners of Lancaster county S. C. which see for terms and conditions of the trust.

BOSTON SAFE DEPOSIT
& TRUST COMPANY,
Trustee,

By —— ——, *Treas.*

$800. Cane Creek township, Coupon No.
County of Lancaster, South Carolina.

Will pay the bearer
July 1st, 1889, dollars
Interest on its bond No. for 000 dollars.
Issued to the Charleston, Cincinnati & Chicago R. R. Co.
At
County treasurer's office,
Lancaster, South Carolina.

——, ——,
Clerk of Board of County Commissioners.

18 EXHIBIT C.

COLUMBIA, S. C., *August 18th*, 1888.

J. H. Averill, Esq., sup't Charleston, Cincinnati & Chicago R. R., Summerville, S. C.

DEAR SIR: Having been notified by your company that they desire to put in operation the twenty-four miles of your railroad extending from Lancaster to Rock Hill, the commission, according to law, on the 17th day of August instant, examined the same and certify that all laws in relation to the construction of same have been complied with and that the road appears to be in safe condition for operation. Your company is accordingly authorized to open same for public use on and after Monday, August 20th, 1888.

Yours truly,
(Signed) M. L. BONHAM,
Chm. Board R. R. Comm'rs.

19 EXHIBIT D.

Engineer's Certificate.

To board of commissioners of Lancaster county, State of South Carolina:

Charleston, Cincinnati & Chicago Railroad Co.

In accordance to the terms of the trust agreement made and entered into on the — day of ——, A. D. 1887, by and between the board of commissioners of Lancaster county, State of South Carolina and the Boston Safe Deposit & Trust Company of Boston, State of Massachusetts, I hereby certify that the following-named sections of the railroad contracted to be built by the Massachusetts and Southern Construction Company for the Charleston, Cincinnati and Chicago Railroad Company are completed and in operation as follows: From the Kershaw county line to Rock Hill S. C., forty miles, being through the townships of Pleasant Hill Gillis Creek, Cane Creek and Waxhaw, Lancaster county, S. C.

(Signed) THOS. E. MATSON,
Chief Engineer.

Johnson City, Tenn, August 20th, 1888.

Refusal of Board of Commissioners of Lancaster County to Certify.

This certifies that R. E. Allison, Esq., representing the Charleston, Cincinnati & Chicago Railroad Company and the construction company appeared before the board of county commissioners for Lancaster county and demanded the certificate that the railroad was completed from Camden to Rock Hill through the townships of Pleasant Hill, Gill's Creek and Cane Creek in Lancaster county, upon which certificate the bonds in the hands of the Boston Safe Deposit & Trust Company of Boston, it is proposed, should be delivered to the C. C. & C. railroad, but the Co. comm'rs refuse to give such certificate and thereby deliver said bonds mainly upon the ground, among other things, that the supreme court of S. C. has decided that townships have no authority under the Constitution to issue such bonds in aid of railroads. Demand and refusal made at Lancaster S. C., Jan. 12, 1889.

(Signed) IRA B. JONES,
Clk Co. Com'rs, &c.

Mr. Allison at same time exhibited the certificate of the chief engineer to the effect that said railroad was completed through said township.

(Signed) IRA B. JONES,
Clk Co. Com., &c.

20 EXHIBIT E.

BOSTON, MASS., *April 24th*, 1889.

To the chairman and members of the board of commissioners of Lancaster county, S. C., Ira B. Jones, clerk, Lancaster, S. C.

GENTLEMEN: Demand has been made upon the Boston Safe Deposit and Trust Company by the Massachusetts & Southern Construction Company, upon order of the Charleston, Cincinnati & Chicago Railroad Company for delivery to it of nineteen thousand dollars ($19,000) of the 7 % coupon bonds of Cane Creek township, S. C., issued July 1st, 1887, due July 1st, 1912, $39,000 7 % coupon bonds of Gill's Creek township, S. C., issued July 1st, 1887, due July 1st, 1912, and $19,000 7 % coupon bonds, of Pleasant Hill township, S. C., issued July 1st, 1887, due July 1st, 1912—all of which bonds were issued by townships in your county, in aid of the construction of the Charleston, Cincinnati & Chicago railroad.

Demand is made upon us for the delivery of said bonds, with interest adjusted from the time of completion of said railroad through said township, and the acceptance of the same by the railroad commissioners of S. C.

On the evidence furnished us in support of this demand, and considering the judgment of your supreme court, holding trust indenture executed between this company and your board "*ultra vires*, a nullity because not in pursuance of any duty imposed by law" upon your board, it seems to us that the particular form of evidence of the completion of the railroad through townships, prescribed in the void indenture, need not now be considered by us.

Unless therefore you furnish this company with sufficient reasons for not delivering these funds as requested, it is advised that it must hold itself in readiness to make delivery on any day after May 2d, prox.

(Signed) BOSTON SAFE DEPOSIT & TRUST COMPANY,
By F. M. STONE, *Pres't.*

In answer to the foregoing letter of the Boston Safe Deposit & Trust Company, the following reply was received:

OFFICE OF COUNTY COMMISSIONERS LANCASTER COUNTY,
LANCASTER C. H., S. C., *May 1st*, 1889.

Boston Safe Deposit & Trust Company, Boston, Mass.

SIRS: You are hereby respectfully notified to hold the papers called township bonds, placed in your hands for safe keeping under trust agreement, by Co. com'rs of Lancaster Co. You are bound by the agreement to hold until the certificate referred to in said agreement is signed by the com'rs; in other words under said
21 agreement you are agent of Co. com'rs and hold bonds as such agent under stipulation that you will not deliver until per-

mission is given by Co. com'rs for their delivery in the specified way. We hold that the bonds in your hands are void as such, and if you part with the possession of them, you must return them to the Co. com'rs. If you deliver to any other party, you will do so in defiance of your agreement.

You fly-blow the bonds (if possible) because by the force and terms of the bonds and the endorsement you are required to make, holders must take notice of the terms of the trust agreement. If the contract under which you hold bonds as agents is *ultra vires* so far as com'rs are concerned, you cannot escape your obligation on that ground. If the contract is *ultra vires* your duty is to return the bonds to your principal, the Co. com'rs as agents of the townships, and not to assume authority in the premises. Your possession of the bonds is just as much *ultra vires* as the contract under which you get possession. If you turn over bonds in defiance of our objection we would feel bound to let the public know your breach of trust, and in such case we fail to see how bondholders will be benefitted. You must either hold the bonds or return them to the Co. com'rs of Lancaster county, and leave claimants to whatever legal remedy they may have to get possession of the bonds, or recover the "debt" referred to in act of 1888 &c.

Very respectfully,

(Signed) J. H. HARPER,
H. N. CLYBURN,
Co. Com'rs L. C.

Attest:
[SEAL.] IRA B. JONES, *Clerk.*

22 I, A. B. Harris, president of The Massachusetts and Southern Construction Company, complainant in the above cause, having read the foregoing bill of complaint and being duly sworn, do say that the matters and things therein contained are true to the best of my knowledge and belief.

A. B. HARRIS.

STATE OF NEW HAMPSHIRE, }
Merrimack, } *ss:*

NOV. 5TH, 1889.

Then personally appeared A. B. Harris and made oath to the truth of the foregoing statement by him subscribed.

Before me—

NATHANIEL E. MARTIN,
[SEAL.] *Notary Public.*

23 And on the 8th day of November, 1889, came into court the complainant, The Massachusetts and Southern Construction Company, by its solicitors, Lord and Hyde, and filed the following subpœna:

Subpœna.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

The President of the United States of America to Cane Creek Township, in the county of Lancaster, in the State of South Carolina, and the Boston Safe Deposit and Trust Company:

You are hereby strictly commanded and firmly enjoined that, all manner of excuses being laid aside, you be and appear before the judges of the circuit court of the United States for the district of South Carolina, at Charleston, on the first Monday of December, 1889, twenty days after the service thereof, then and there true and perfect answer to make, upon your corporal oath on the Holy Evangelists, to all such matters as shall be objected against you in the bill of complaint of the Massachusetts and Southern Construction Company.

And also that you do on the rules day next immediately
24 after the day appointed and expressed file or cause to be filed in the registry of said court your plea, answer, or demurrer to the said bill of complaint.

Hereof fail not under the pain of one hundred pounds.

Given under the seal of the said court.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, at Charleston, in South Carolina district aforesaid, the 8th day of November, in the year of our Lord one thousand eight hundred and eighty-nine, and in the one hundred and fourteenth year of the sovereignty and independence of the United States of America.

LORD & HYDE,
Complainant's Solicitors.

[SEAL.] J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Marshal's Return.

H. R. Boykin, deputy U. S. marshal, being duly sworn, says he served Minor C. Gardner, county commissioner of Lancaster county, S. C., with copy of within process, at Kershaw, S. C., on November 9th, 1889; also served James H. Harper and Henry N. Clyburn, county commissioners of Lancaster county, S. C., at their residences in Lancaster county, S. C., with copies of within process on November 9th, 1889.

25

H. R. BOYKIN,
Deputy U. S. Marshal.

Sworn to before me this the 11th day of November, 1889.

B. A. HAGOOD,
Deputy C. C. C. U. S., Dist. S. C.

Entered in Docket Book, folio 142.
Nov. 8th, 1889.

G. I. CUNNINGHAM,
U. S. Marshal.

Filed 8th Nov., 1889.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

26 And on the 30th day of November, 1889, the following notice of appearance was filed:

Appearance.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY }
vs.
THE TOWNSHIP OF CANE CREEK, in the County of Lancaster and State of South Carolina, and The Boston Safe Deposit and Trust Company. }

James H. Harper, Henry N. Clyburn, and Minor C. Gardner, as county commissioners of Lancaster county, State aforesaid, having been served with *subpœna ad re* in above-stated cause, and they having as far as in their power authorized me to appear for The Township of Cane Creek, in said county, defendant, take notice that I appear herein in behalf of said defendant without, however, waiving any question as to service of process on said defendant.

IRA B. JONES, *Solicitor.*

Filed 30th November, 1889.

27 And on the 2nd day of December, 1889, The Boston Safe Deposit and Trust Company, defendant, by its solicitor, R. W. Shand, filed its notice of appearance.

R. W. SHAND,
Sol'r for Boston Safe Deposit & Trust Company.

And on the 6th day of January, 1890, came into court the defendant, by its solicitors, C. R. Miles and Ira B. Jones, and filed the following motion to dismiss bill for want of service:

Motion.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court. In Equity.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY
vs.
THE TOWNSHIP OF CANE CREEK, in the County of Lancaster and State of South Carolina, and The Boston Safe Deposit and Trust Company.

Bill for specific performance.

And now comes Ch. Richardson Miles and Ira B. Jones in behalf of The Township of Cane Creek, in the county of Lancaster, defendant in the above-entitled cause, and suggests to the court and gives it to understand (apparently only for the purpose of this motion) that the subpœna in this case directed to the defendant, Cane Creek Township, has been served upon James H. Harper, Henry N. Clyburn, and Minor C. Gardner, who are county commissioners of the said county
28 of Lancaster, and that said county commissioners are not the corporate agents of and do not represent the said township, and that the service upon the said county commissioners is not a service upon the defendant township.

Wherefore, without submitting the rights of said defendant township to the jurisdiction of the court, defendant respectfully insists that the court has no jurisdiction of the said defendant township because of want of service of process thereon, and moves that the said service upon the county commissioners of Lancaster county be set aside and the proceedings be stayed and dismissed as to defendant, said *Gill's* Creek Township, and for such other order as may be proper in the premises.

CH. RICHARDSON MILES,
IRA B. JONES, *Def'd'ts Sol'rs.*

Filed 6th January, 1890.

29 And on the 6th day of January, 1890, came into court the defendant, by its solicitors, Ira B. Jones and Ch. Richardson Miles, and filed the following plea:

Plea.

THE UNITED STATES OF AMERICA,)
District of South Carolina.)

Circuit Court. In Equity.

THE MASSACHUSETTS & SOUTHERN CONSTRUCTION COMPANY
vs.
THE TOWNSHIP OF CANE CREEK, in the County of Lancaster and State of South Carolina, and The Boston Safe Deposit & Trust Company.

Bill for Specific Performance.

The plea of the defendant The Township of Cane Creek, in the county of Lancaster and State of South Carolina, to the bill of complaint of The Massachusetts & Southern Construction Company, complainant in the above-entitled action, respectfully shows—

That this defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint mentioned and contained to be true as the same are therein set forth and alleged, for plea to so much of the said bill as alleges "that the defendant The Boston Safe Deposit & Trust Company, a corporation duly organized under the laws of the State of Massachusetts and a citizen of said State, is a formal defendant merely which is without any interest whatever in the controversy which forms the subject-matter of said bill; which said controversy is wholly between the complainant and the defendant township," and as seeks to compel this defendant to specifically perform certain alleged agreements with its codefendant, The Boston Safe Deposit & Trust Company, by assenting to the delivery of certain alleged bonds therein described, now in the hands of the said Boston Safe Deposit & Trust Company, doth plead in bar and for plea saith—

That the said Boston Safe Deposit & Trust Company is not, as therein alleged, a formal party merely without interest in the controversy in this action, but is the party against whom principally relief is prayed, and is a necessary party without whom the court cannot proceed to decide upon the merits of the controversy between the other parties before the court, and cannot be stricken out or dispensed with, and, the said defendant being a citizen of the same State as complainant, the court is without jurisdiction of the case.

And this defendant for further plea to said bill of complaint says that by the deed of trust set forth in said bill of complaint it is an express condition precedent to the assent by this defendant that the bonds therein described shall be delivered to the complainants by the defendant The Boston Safe Deposit & Trust Company; that the chief engineer of the Charleston, Cincinnati & Chicago Railroad Company and a majority of the board of commissioners of said county, attested by the clerk thereof with the corporate seal of Lancaster county, shall, over their hands, certify to the Boston Safe Deposit & Trust Company that the track of said railroad is laid and

the railroad is ready for operation through the said township of Cane Creek, and that said board of county commissioners and their clerk ought to be and are not parties to said bill of complaint, as this defendant is advised, especially since it is alleged in said bill that said board of county commissioners fraudulently refused to certify as aforesaid; all of which matters and things this defendant avers to be true, and pleads the same to the said bill of complaint, and humbly demands the judgment of this honorable court whether it will hold the plea and jurisdiction upon the said bill and if said defendant should be compelled to make any further answer to said bill, and prays to be hence dismissed with its reasonable costs and charges in that behalf most wrongfully sustained.

IRA B. JONES, *Def't- Sol'r.*

31 THE STATE OF SOUTH CAROLINA, }
County of Lancaster, } *ss:*

Personally appeared J. H. Harper, H. N. Clyburn, and M. C. Gardner, who, being duly sworn, say that they are county commissioners of the county of Lancaster, in the State of South Carolina, and have been served with process in the above-entitled action, and that the foregoing plea is true in substance and in fact.

J. H. HARPER.
H. N. CLYBURN.
M. C. GARDNER.

Sworn to before me this 28th day of December, 1889.

R. E. WYLIE,
Notary Public for S. C.

We hereby certify that, in our opinion, the foregoing plea is meritorious and well founded in law.

CH. RICHARDSON MILES,
IRA B. JONES, *Def't- Sol'rs.*

32 STATE OF SOUTH CAROLINA, }
County of Lancaster. }

Personally appeared J. H. Harper and H. N. Clyburn, who, being duly sworn, say that they are county commissioners for Lancaster county, and have been served with process in the above-stated case; that the foregoing plea is true in substance and in fact, and that the same is not interposed for delay.

J. H. HARPER.
H. N. CLYBURN.

Sworn to and subscribed before me January 4th, 1890.

B. J. WITHERSPOON,
U. S. Commissioner.

33 And on the 6th day of January, 1890, came into court the defendant, by its solicitors, Ira B. Jones and Ch. Richardson Miles, and filed the following answer:

Answer.

THE UNITED STATES OF AMERICA,)
District of South Carolina.)

Circuit Court. In Equity.

THE MASSACHUSETTS & SOUTHERN CONSTRUCTION COMPANY
vs.
THE TOWNSHIP OF CANE CREEK, in the County of Lancaster and State of South Carolina, and The Boston Safe Deposit & Trust Company.

Bill for Specific Performance.

The separate answer of The Township of Cane Creek, in the county of Lancaster, in the State of South Carolina, one of the defendants, to the bill of complaint of The Massachusetts & Southern Construction Company, complainant.

The said defendant, reserving to itself all benefit and advantage of exception to the said bill of complaint, to the errors and other imperfections in said bill of complaint contained, as well to those the subject-matter of the plea filed by this defendant herein or others, for answer thereto or to so much thereof as it is advised that it is necessary or material for it to make answer unto, answering, says:

1. As to paragraph 1 of said bill of complaint, it admits that the complainant is a corporation and a citizen of the State of Massachusetts; it denies that this defendant is a body corporate in the sense and for the purpose stated in said bill of complaint; it admits that the defendant The Boston Safe Deposit & Trust Company is a corporation and citizen of the State of Massachusetts (the same
31 State of which the complainant is a citizen), but it denies that said defendant The Boston Safe Deposit & Trust Company is "a formal defendant merely, which is without any interest whatever in the controversy which forms the subject-matter of the bill, and that said controversy is wholly between the complainant and this defendant," but, on the contrary, this defendant alleges and avers that the said defendant The Boston Safe Deposit & Trust Company is a necessary and indispensable party to said bill of complaint, against whom the principal relief is prayed; that the said defendant company has not only an interest under the trust deed set forth in said bill, but a duty to perform as trustee under said deed; that the name of said defendant cannot be stricken out, and that the joinder of said def't as a party ousts the jurisdiction of this court.

And this defendant prays that it be allowed the advantage of this objection to the jurisdiction of the court as if the same were taken by plea.

It admits that the Boston Safe Deposit & Trust Company is the custodian of certain bonds in the said bill of complaint described, but it denies that the said bonds were or could be legally issued by this defendant township, as alleged in said bill of complaint.

It admits the allegations of this paragraph as to the statutes of the State of South Carolina therein stated, but avers that said statutes are in violation of section 8, article IX, of the constitution of the State of South Carolina, and have been declared unconstitutional by the supreme court of said State in the case of "Perrin *vs.* Floyd" and "Whitesides *vs.* Neely" in so far as the same relates to subscription by townships in aid of railroads.

2. As to paragraph 2 of said bill of complaint, this defendant admits that at an election duly petitioned for, ordered, and held on the 26th day of June, 1886, pursuant to the provisions of the foregoing act and amendment thereto, a majority of the qualified voters of Cane Creek township voting at said election voted a subscription of $19,000 to the capital stock of the Charleston, Cincinnati & Chicago Railroad Company, as then incorporated, payable in the bonds of said township, and that thereafter the board of county commissioners for said Lancaster county, then in office, claiming to act as the corporate agents of said township, made the subscription to the capital stock of the Charleston, Cincinnati & Chicago Railroad Company, and that said subscription was accepted by
35 said railroad company, but it is denied that said township has since voted upon said stock at any meeting of the stockholders of said railroad, and it is averred that the Charleston, Cincinnati & Chicago Railroad Company at the time of the alleged subscription payable in bonds and at the time of the signing and delivery of said bonds to said trustee was a different corporation and railroad company from the Charleston, Cincinnati & Chicago Railroad Company, in aid of which the said vote was taken, and that said subscription and delivery of bonds to trustee was without authority.

Defendant further avers that the majority of the voters of said township did not vote in favor of said subscription, as required in the notice and terms of said election duly published previous thereto and assented to by the said railroad company and the complainants, and that said subscription was in violation of the terms and conditions of said election in this regard. Defendant further avers that the act and amendment thereto under which said election was held was unconstitutional as aforesaid, and that the said petitions, order for election, election, vote, subscription, and all acts and proceedings by any voter of said township or by the county commissioners of Lancaster county pursuant to said statutes were each and all without authority of law and not binding on this defendant township, and that the county commissioners of Lancaster county were not at the times of the acts and proceedings aforesaid the corporate agents of this defendant, nor have they since become such agents, and that this defendant was not at said times, nor has it since become, a corporate body with powers as such to subscribe bonds or consent to taxation to pay any bonded indebtedness sought to be incurred in aid of railroads, and had not and has not any corporate purpose to be subserved thereby.

3. As to paragraph 3 of said bill of complaint, this defendant admits that the predecessors in office of the present board of county

commissioners of Lancaster county executed the trust agreement set forth in said bill of complaint as "Exhibit A," and also admits that Exhibit "B" correctly shows a copy of one of the bonds with one of the interest coupons thereon, and that 190 of these bonds were signed by said board of county commissioners of Lancaster county on the 30th day of November, 1887, not July 1st, 1887, as alleged in said bill, and on the — day of December, 1887, were delivered by said board to the defendant The Boston Safe Deposit &
36 Trust Company under the deed of trust aforesaid, and that said defendant company accepted said trust and executed said trust agreement and received said bonds as such trustee, but denies each and every other allegation contained in said paragraph 3, and avers, as aforesaid, that said board of county commissioners were not the agents of this defendant and had no power or authority to sign said bonds and deliver them to the said trust company or to make any contract or to do any act in relation thereto binding on this defendant, nor has this defendant now any power, nor had it at any time any power, to authorize or assent to the said acts of said county commissioners or to deliver or to assent to the delivery of said bonds to the complainant or to the said railroad company.

4. This defendant does not admit the truth of the allegations in paragraph 4 of said bill of complaint as therein stated, but requires legal proof of the same.

5. As to paragraph 5 of said bill of complaint, defendant admits that on the 12th day of January, 1889, the certificate set forth as Exhibit "D" was presented to the board of county commissioners of Lancaster county for signature, and that the same was refused, as shown in the certificate of the clerk of said board set forth in said bill as a part of Exhibit "D," but denies that the said engineer's certificate was presented for the signature of said board previous to said 12th day of January, 1889; and this defendant denies that said board of county commissioners fraudulently refused to sign said engineer's certificate, as therein stated, and this defendant alleges and avers that the said county commissioners of Lancaster county are proper and necessary parties to this action to defend their actions in the premises and that they are not parties hereto; and this defendant prays that it be allowed the benefit and advantage of this objection for want of parties as if the same were made by plea or demurrer.

6. As to paragraph 6 of said bill of complaint, this defendant admits the passage of the act of the General Assembly of the State of South Carolina approved December 22, 1888, as set forth in said paragraph, but denies each and every statement of the said bill of complaint as to the intention, purport, and effect of said act.

But this defendant alleges and avers that the supreme court
37 of the State of South Carolina, the highest court of said State, has decided that townships within the State of South Carolina have no power or authority under the constitution and laws of said State to issue bonds in aid of railroads, and that all such township bonds are absolutely null and void, because the act of the General Assembly under and by virtue of which said townships' sub-

scriptions were made and bonds issued or attempted to be issued was in violation of the constitution of said State; that under the decisions of said supreme court the alleged consent of this defendant township to said township subscription, the subscription itself, and the bonds now in the hands of the defendant trust company pursuant thereto being null and void, defendant submits that the defendant The Boston Safe Deposit & Trust Company cannot lawfully deliver the said bonds to the complainant either as bonds or as furnishing evidence of the debt sought to be imposed on certain townships in this State by the said act of 1888, and that if complainants acquired any rights against this defendant under said act, which is denied, that the possession of said bonds or papers is not essential to enable complainant to prosecute and enforce whatever legal rights, if any, the complainant may have against this defendant; and this defendant denies that it has ever consented to be taxed for the payment of said bonds or debt, but, on the contrary, has ever protested against the same; and defendant avers that said bonds were signed by the county commissioners of Lancaster county and by them were placed in the hands of the defendant The Boston Safe Deposit & Trust Company merely in escrow and subject to the control of said county commissioners under said trust agreement, and have never been issued in the sense of that term as used in the act of 1888; that the said act of 1888 applies only to townships in the State of South Carolina which had issued bonds previous to the date of the approval of said debt, to wit, December 22, 1888, and does not apply to this defendant, which has issued no bonds, and that said act of 1888, in so far as it attempts to validate any township bonds issued in aid of railroads in this State or to impose a debt on this or any township in this State, to be evidenced by bonds issued or agreed to be issued pursuant to the provisions of the said unconstitutional and void act of 1883, is itself violative of the constitution of said State of South Carolina and is wholly ineffectual, null, and void.

7. This defendant denies the allegations contained in para-
38 graph 7 of the said bill of complaint.

8. As to paragraph 8 of the said bill of complaint, this defendant admits that the complainant applied to the board of county commissioners of Lancaster county to take the necessary steps to have the trust executed and the possession of the said bonds delivered to it, and that the said demand was refused, but this defendant further alleges that thereupon the said Charleston, Cincinnati & Chicago Railroad Company, The Boston Safe Deposit & Trust Company, and the complainant applied to the supreme court of South Carolina for a mandamus to compel the board of county commissioners of Lancaster county and the clerk of said board to affix their signatures to said certificate of the chief engineer of said railroad company that said railroad had been completed through defendant township, and that upon said application the said supreme court of South Carolina refused the said writ of mandamus, and in the decree therein reaffirmed the previous judgment of the said court that the act under which said alleged township subscription

and bonds were made was unconstitutional and void; that the said act of 1888 did not undertake to make or declare valid the said bonds; that it was not the duty of the said county commissioners of Lancaster county to sign said certificate, and that all the acts and proceedings of said county commissioners of Lancaster county under the statutes referred to in paragraph 1 of said bill of complaint, including the said trust agreement, were *ultra vires* and void. This was the only issue adjudged by the said court, and whatever else is said in said judgment by any of the honorable justices of said court is *obiter dicta*.

9. Defendant admits the facts stated in paragraph 9 of said bill, but denies the legal conclusions therein stated.

10. Defendant does not admit the allegations contained in paragraph 10 of said bill of complaint, but requires proof thereof.

11. Defendant denies the allegations contained in paragraph 11 of said bill of complaint.

12. Defendant denies the allegations contained in paragraph 12 of said bill of complaint as therein stated.

13. This defendant avers that the complainant is not a *bona fide* holder of said township bonds, nor a *bona fide* owner of said bonds or debt represented by said bonds and entitled to the possession thereof as a purchaser for value without notice, but, on the contrary, defendant avers that said complainant, in its own interest, worked up said election in defendant township, said subscription by said county commissioners, the signing of said bonds and the delivery thereof to said trustees, and had notice and knowledge of all the facts, defects, and want of authority appertaining thereto.

39

And this defendant denies that complainant is entitled to the relief prayed against it or its codefendant in said bill of complaint, and denies that there is any other matter, cause, or thing in said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered or denied, and, if any such there be, the same is not true to the knowledge and belief of this defendant; all of which matters and things in this answer contained this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained, and for any other proper relief.

IRA B. JONES, *Def'ts' Sol'r.*
CH. RICHARDSON MILES,
Of Counsel.

40 STATE OF SOUTH CAROLINA, }
County of Lancaster. }

Personally appeared J. H. Harper and H. N. Clyburn, who, being duly sworn, say that they are county commissioners of Lancaster

county and have been served with process in the above-stated case; that the foregoing answer is true in substance and in fact.

J. H. HARPER.
H. N. CLYBURN.

Sworn to and subscribed before me January 4th, 1890.
B. J. WITHERSPOON,
U. S. Commissioner.

THE STATE OF SOUTH CAROLINA,
County of Lancaster, } *ss:*

Personally appear J. H. Harper, H. N. Clyburn, and M. C. Gardner, who, being duly sworn, say that they are county commissioners of Lancaster county, in the State of South Carolina, and have been served with process in the above-entitled action, and that the foregoing answer is true in substance and in fact, to the best of their knowledge and belief.

J. H. HARPER.
H. N. CLYBURN.
M. C. GARDNER.

Sworn to before me this 28th day of December, 1889.
R. E. WYLIE,
N. P. for S. C.

41 And on the 6th day of January, 1890, came into court the defendant The Boston Safe Deposit & Trust Company, by its solicitor, R. W. Shand, and filed the following answer:

Answer.

In the United States Circuit Court for the District of South Carolina, November Term, 1889.

THE MASSACHUSETTS & SOUTHERN CONSTRUCTION COMPANY
vs.
THE TOWNSHIP OF CANE CREEK, in the County of Lancaster and State of South Carolina, and The Boston Safe Deposit & Trust Company. } Equity.

The answer of The Boston Safe Deposit & Trust Company, defendant, to the bill of complaint.

This defendant, saving and reserving unto itself the benefit of all exceptions to the errors and imperfections in said bill contained, for answer to so much thereof as they are advised it is necessary or material for them to answer unto, do aver and say that it admits that it holds in its possession the bonds described in the third paragraph of the complainant's bill purporting to be issued by said defendant township to the amount of nineteen thousand ($19,000) dollars, as follows: Nineteen bonds of the denomination of one hun-

dred ($100) dollars each, all bearing interest at the rate of seven per cent. per annum, with the principal, payable twenty-five years
42 from date, the same having been placed in the hands of this defendant upon trusts set forth in the third paragraph of said bill of complaint, but more fully exhibited in a trust indenture made and executed between this defendant and the board of commissioners for the county of Lancaster, in said State of South Carolina, as corporate agents for said defendant township, which said indenture of trust the complainant has annexed to *his* bill of complaint as Exhibit "A," and to which trust indenture this defendant asks leave to refer; that this defendant accepted said trust, as set forth in said indenture of trust, received said bonds as such trustee, and duly endorsed the trustee's certificate thereon.

Said trust indenture provides, among other things, that before said bonds shall be delivered to the complainant by this defendant this defendant shall be furnished with a certificate signed by the chairman of the county commissioners of said county of Lancaster, whose signature shall be tested by the clerk of said board of county commissioners, certifying to the completion of said railroad within certain limits more fully set forth in said indenture. No such certificate has ever been furnished to this respondent. This defendant admits that the complainant procured from said railroad company certificates of capital stock in the Charleston, Cincinnati & Chicago Railroad Company, as set forth in the eleventh paragraph of the complainant's bill, and placed the same in this defendant's hands to be delivered to said defendant township whenever this defendant should deliver said bonds to said complainant in accordance with the terms of said trust, and that this defendant now holds said certificates of stock for the purpose of making such delivery thereof.

It admits that the complainant has demanded of this defendant that it should deliver said bonds to the complainant, and believing that the complainant had complied with all of the conditions of said indenture of trust, excepting to procure the signature of said chairman of said board of county commissioners as aforesaid, and believing that said defendant refused to sign without good
43 and sufficient reason therefor, caused a notice to be sent to the said board of county commissioners, as corporate agents of said defendant township, as set forth in the ninth paragraph of the complainant's bill; which said notification and reply thereto are annexed to the complainant's bill and are marked "Exhibit E" thereof; that, in consequence of said reply to said notification and desiring to avoid the litigation therein threatened, this defendant has not paid over said bonds or said certificates of stock, but now holds the same; this defendant further admits that it has no interest whatever in said bonds or the debt represented thereby or in said certificates of stock. It has no claim for any service whatever in connection therewith, the same having been fully paid at or about the time when it received said bonds by the terms of said trust indenture; that it is a mere stakeholder with reference thereto; that it has been ready and willing and is now ready and

willing to execute said trust by paying over and delivering said bonds and also said certificates of stock, which it holds, whenever it may be protected in so doing. This defendant neither admits or denies the remaining allegations of said bill of complaint, but leaves the complainant to prove so much thereof as is material.

And having thus fully made answer to said bill, this defendant prays to be hence dismissed with costs.

BOSTON SAFE DEPOSIT & TRUST COMPANY,
By F. M. STONE, *President.*

44 UNITED STATES OF AMERICA, }
District of Massachusetts, Boston. }

I, F. M. Stone, president of The Boston Safe Deposit & Trust Company, a defendant in above cause, having read the foregoing answer and being duly sworn, do say that the matters and things in said answer contained are true.

F. M. STONE.

Subscribed and sworn to before me this 19th day of December, 1889.

HENRY L. HALLETT,
[SEAL.] *U. S. Commissioner, Mass. Dist.*

Commissioner's fee, $1.00.

45 And on the 17th day of January, 1890, came into court the complainant, by its solicitors, Lord & Hyde, and filed the following replication:

Replication.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court. In Equity.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY }
vs. }
THE TOWNSHIP OF CANE CREEK, in the County of Lancaster and State of South Carolina, and The Boston Safe Deposit and Trust Company. }

The replication of the Massachusetts and Southern Construction Company, complainant, to the answer of The Boston Safe Deposit and Trust Company *and Trust Company*, defendant.

This repliant, saving and reserving unto itself all and all manner of exception to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this,

that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

LORD & HYDE,
Complainant's Solicitors.

Filed 17th January, 1890.

46 And on the 22nd day of January, 1890, came into court the complainant, by its solicitors, Lord & Hyde, and filed the following replication:

Replication.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court. In Equity.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY
vs.
THE TOWNSHIP OF CANE CREEK, in the County of Lancaster and State of South Carolina, and The Boston Safe Deposit and Trust Company.

The replication of The Massachusetts and Southern Construction Company, complainant, to the answer of The Township of Cane Creek, in the county of Lancaster and State of South Carolina, defendant.

This repliant, saving and reserving unto itself all and all advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

LORD & HYDE,
Complainant's Solicitors.

Filed 22nd January, 1890.

47 And on the 24th day of February, 1890, came into court the complainant, by its solicitors, and filed the following order of reference:

Order of Reference.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court. In Equity.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY
vs.
THE TOWNSHIP OF CANE CREEK, in the County of Lancaster and State of South Carolina, and The Boston Safe Deposit and Trust Company.

Upon motion of Lord & Hyde, complainant's solicitors—

It is ordered that G. W. Dingle, Esquire, be and is hereby appointed special master to take the testimony in these several eight cases; that the complainant have twenty days in which to take their testimony, the same dating from February 10th inst.; that the defendants have twenty days thereafter in which to take their testimony, and that the complainant have ten days to reply. Let this order be entered in each of said eight cases.

CHARLES H. SIMONTON, *U. S. Judge.*

24th February, 1890.

We consent.
CH. RICHARDSON MILES.

Filed 24th February, 1890.

48 *Agreed Statement of Facts by Counsel in the Cause.*

In the United States Circuit Court, District of South Carolina.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY, Complainant,
vs.
TOWNSHIP OF CANE CREEK, in the County of Lancaster and State of South Carolina, and The Boston Safe Deposit & Trust Company, Respondents.

It was agreed among counsel on the circuit and so heard that the motion to set aside service and the pleas to the jurisdiction should be heard when the case was tried on its merits without prejudice, the motion not to be deemed as waived or overruled by the pleas and answer and the pleas not to be deemed waived or overruled by the answer, and for the sake of convenience this agreement shall continue of force for the purposes of this appeal and hearing in the Supreme Court. The complainant and the defendant The Boston Safe Deposit and Trust Company are corporations and citizens of the State of Massachusetts and the Charleston & Cincinnati & Chicago R. R. Co. is a corporation and citizen of the State of South Carolina.

The organization of townships into corporations was provided for by act of legislature of South Carolina September 26th, 1868, but this act was repealed January 19th, 1870, leaving townships in South Carolina mere territorial subdivisions of counties without corporate powers, retaining only their names and boundaries.

The Georgetown and North Carolina Railroad Company was chartered by the legislature of South Carolina March 4th, 1878,
section 4 of which act of incorporation provided that for the
49 purpose of creating the capital stock of said company "subscriptions thereto may be received, payable in money, bonds, or other valuable credits, lands, labor, or material necessary in the construction of said road, in such manner and on such terms as may be agreed upon between said company and such subscribers." Said act was amended by an act approved February 9th, 1882, and also further amended *to* said act approved December 21st, 1883, which provided in section eleven thereof as follows: "That it shall be and may be lawful for any county or township interested in the construction of said railroad to subscribe to its capital stock such sums as a majority of its voters voting at an election held for that purpose may authorize the county commissioners to subscribe, which subscription shall be made in seven per cent. coupon bonds, payable twenty-five years after the date thereof, and to be of the denomination of one hundred, five hundred, and one thousand dollars," and enacted in section 14 thereof, for that purpose *of* and to carry out the provisions of this act, "Such counties and townships as shall vote for subscription are hereby created bodies politic and corporate under their respective names and are vested with powers necessary for carrying out the provisions of this act, and the commissioners of any county so incorporated are hereby declared to be the corporate agents of such county or township;" and also by a further amending act, approved December the 22nd, 1885, whereby the name of said railroad company was changed to "The Charleston, Cincinnati & Chicago Railroad Company," and conferring upon the said last-named company all the rights, powers, privileges, franchises, and immunities conferred upon and enjoyed by the said Georgetown and North Carolina Narrow Gauge Railroad Company.

That at an election duly petitioned for, ordered, and held on
the 26th day of June, 1886, pursuant to the provisions of the
50 foregoing act and amendments thereto, the qualified voters of Cane Creek township voted a subscription of $19,000 to the capital stock of said railroad company, payable in the bonds of said township. On the 10th day of September, 1886, the Charleston, Cincinnati & Chicago Railroad Company consolidated with the Rutherford, Marion and Tennessee Railroad Company and the Rutherfordton Railway Construction Company, operating in the State of North Carolina under charters from that State, being consolidated under the name of the Charleston, Cincinnati & Chicago Railroad Company. The following act was passed by the General Assembly of South Carolina, approved December 24th, 1886:

"No. 358. An act to ratify and confirm the act of consolidation of the 'Charleston, Cincinnati & Chicago Railroad Company,' a corporation organized under the laws of this State, to and with the 'Rutherford Railway Construction Company' and the 'Rutherfordton, Marion and Tennessee Railway Company,' corporations organized under the laws of the State of North Carolina under the names of the Charleston, Cincinnati & Chicago Railroad Company.

SEC. 1. Be it enacted by the senate and house of representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the act of consolidation of the 'Charleston, Cincinnati & Chicago Railroad Company' a corporation organized under the laws of this State, to and with, 'The Rutherford Railway Construction Company' and the 'Rutherfordton, Marion and Tennessee Railway Company,' corporations organized under the laws of the State of North Carolina, under the name of the 'Charleston, Cincinnati & Chicago Railroad Company' be, and the same is hereby, ratified and confirmed.

51 SEC. 2. That all contract agreements, demises, conveyances, indentures or other acts of things done and performed by said consolidated company under its new name prior to the passage of this act be, and the same are hereby, declared valid so far as the same may be done by law.

SEC. 3. That the said 'Charleston, Cincinnati & Chicago Railroad Company' shall have the right to effect a consolidation with any railway company in the State of Tennessee, Virginia or Kentucky now or hereafter to be constructed, conforming as near as may be to the conditions and provisions relating to consolidations which are contained in chapter XL of title XII of part I of the General Statutes of this State.

SEC. 4. This act shall be deemed and taken as a public act and shall take effect the date of its approval. Approved December 24th, A. D. 1886."

On or after the 17th day of March, 1887, the board of county commissioners of Lancaster county, pursuant to the statute, notices, and the votes aforesaid referred to in the pleadings, subscribed on the books of said company, as consolidated in behalf of Cane Creek township, for nineteen thousand dollars of the capital stock thereof, payable in coupon bonds of said township, and said subscription was then accepted by said railroad company.

On the 30th day of September, 1886, the Charleston, Cincinnati & Chicago Railroad Company and the Massachusetts and Southern Construction Company entered into an agreement by which the latter was to construct the railroad of the former and to be paid therefor as follows: Forty thousand dollars upon each and every mile of road completed with track laid, payable either in cash or in the capital stock and first-mortgage bonds of said railroad com-

52 pany, at the rate of twenty (20) thousand dollars per mile in the capital stock and twenty (20) thousand dollars per mile in its first-mortgage bonds, as the said railroad company may elect.

Afterwards, on the 2nd day of August, 1887, another agreement was entered into by which the said construction company was to receive from said railroad company in full consideration for the construction of said railroad fifty thousand dollars for each mile of completed road with track laid, payable in cash or in capital stock and first-mortgage bonds, at the rate of twenty-five (25) thousand dollars per mile each of said stock and bonds. The capital stock of said railroad company issued at the rate of twenty-five thousand dollars per mile and the first-mortgage bonds of said railroad issued at the rate of twenty-five thousand dollars per mile were placed in the hands of the Boston Safe Deposit and Trust Company under a trust agreement to be delivered to the said construction company at said rate as each mile of said road was completed, and as each mile of said road was completed the said amount of stock and bonds was duly delivered to the said construction company in payment for the construction of said railroad as the construction progressed. The amount of the capital stock of the Charleston, Cincinnati & Chicago Railroad Company is twenty-five thousand dollars per mile, and the amount of the first-mortgage bonds issued by said railroad company is twenty-five thousand dollars per mile. The trust company holds certificates of stock to be delivered to this township when its bonds are delivered.

That on the 15th day of November, 1885, the following resolution was adopted at a meeting of the stockholders of the Charleston, Cincinnati & Chicago Railroad Company:

Resolved, That the Charleston, Cincinnati & Chicago Rail-
53 road Company hereby assigns and transfers all the right, title, and interest it may now have or hereafter acquire in and to any subscriptions made by any county, town, or city, or by other corporate bodies or individuals to the capital stock of said railroad company in aid of the construction of said railroad to the Massachusetts and Southern Construction Company in the same manner and upon the same conditions as such subscriptions were made to the said Charleston, Cincinnati & Chicago Railroad Company in the several contracts of subscription.

On the 29th day of July, 1887, the directors of the Charleston, Cincinnati & Chicago Railroad Company passed the following resolution:

"Resolved, That all counties, townships, cities, and towns or other corporations, public or private, in the State of North Carolina, South Carolina, Tennessee, Virginia, and Kentucky, which have made subscription to the capital stock of this railroad company in aid of its construction or which may hereafter make such subscriptions, are hereby authorized and directed to pay such subscriptions, to be made either in cash, bonds, lands, to the Massachusetts and Southern Construction Company upon delivery to them by said construction company of the capital stock (or certificates entitling them to the same) of the Charleston, Cincinnati & Chicago Railroad Company, in accordance with the terms upon which subscriptions were made to said railroad company."

Pursuant to this resolution, on the 30th day of July, 1887, the

Charleston, Cincinnati & Chicago Railroad Company by a written instrument assigned to the Massachusetts and Southern Construction Company, among others, the bonds or subscriptions for nineteen thousand dollars by defendant township, and instructed the Boston Safe Deposit and Trust Company "to pay over the same to the Massachusetts and Southern Construction Company at
54 such time as the said Charleston, Cincinnati & Chicago Railroad Company were authorized to receive the same under the various contracts under which the same were lodged with the Boston Safe Deposit and Trust Company." This assignment was filed in the office of the Boston Safe Deposit and Trust Company.

On the 30th day of November, 1887, the county commissioners of Lancaster county, claiming to act as the agents of the defendant township, and the defendant The Boston Safe Deposit and Trust Company executed the following trust agreement, and on the same day the county commissioners signed and sealed with the corporate seal of Lancaster county bonds of the defendant township to the amount of nineteen thousand dollars, and authorized the chairman of said board to deliver said bonds at his earliest convenience to the Boston Safe Deposit and Trust Company, and in December, 1887, said chairman delivered said bonds to the said trust company under this trust agreement. At the same time the certificate of stock in said railroad was deposited with said trust company to be delivered to said township according to said agreement.

55 *Trust Agreement.*

Whereas, in accordance with the provisions of section 11, 12, 13 and 14 of the amendment to the charter of the Georgetown and North Carolina Narrow Guage Railroad Company, granted and ratified by the General Assembly of the State of South Carolina on the 19th day of December A. D. 1883, and approved December 21st, A. D. 1883, providing that it shall and may be lawful for any county or township interested in the construction of said railroad to subscribe to its capital stock. And

Whereas, the General Assembly of South Carolina on the 22nd day of December, A. D. 1885, passed and ratified an act entitled "An act to amend an act entitled 'An act to incorporate the Georgetown and North Carolina Narrow Guage Railroad Company,' and the acts amendatory thereof," by which the words "Georgetown and North Carolina Narrow Guage" were stricken out of the charter of the Georgetown and North Carolina Narrow Guage Railroad Company, and the words "Charleston, Cincinnati and Chicago" were inserted therefor, whereby the name of said corporation became "The Charleston, Cincinnati and Chicago Railroad Company" and

Whereas, on the 26th day of June A. D. 1886, the township of Gill's Creek, in the county of Lancaster, State of South Carolina voted a subscription of thirty-nine thousand (39,000) dollars, and the townships of Cane Creek and Pleasant Hill in said county each voted a subscription of nineteen thousand (19,000) dollars, in seven

per cent. annual interest coupon bonds to the capital stock of the Charleston, Cincinnati and Chicago Railroad Company. And

Whereas, the said "The Charleston, Cincinnati and Chicago Railroad Company" was consolidated with the "Charleston, Cincinnati and Chicago Railroad Company" at a meeting of its directors held September 10th, A. D. 1886, ratified and confirmed by its stockholders at a meeting held at Columbia, S. C. September 14th, A. D. 1886, and said "Charleston, Cincinnati and Chicago Railroad Company" was duly organized at Charleston S. C. on the 30th day of September, A. D. 1886, as provided by law. And

Whereas, the said subscription hereinbefore named was recorded by order of the board of commissioners of said county, as the corporate agent of said townships upon the records of said county in the office of said board of commissioners, and subscribed by the chairman of said board upon the books of the said railroad company.

Now, therefore, this memorandum of agreement, made and entered into on this 30th day of November A. D. 1887, by and between the board of commissioners for the county of Lancaster, as the corporate agent of the townships of Gill's Creek, Cane Creek and Pleasant Hill in said county, and the Boston Safe Deposit and Trust Company, of the city of Boston and State of Massachusetts, witnesseth:

That for the purpose of more fully and satisfactorily carrying out the understandings, agreements, and purpose of the said vote and subscription of the said townships of Gill's Creek, Cane Creek and Pleasant Hill, in said county of Lancaster, according to the time, tenor, intent and spirit of the same, as expressed in the terms submitted to, and indorsed by, the people of said townships at the polls, the board of commissioners of Lancaster county, as the corporate agent of said townships, does hereby transfer, assign, and deliver to the said Boston Safe Deposit and Trust Company, trustee, the within described and mentioned thirty-nine thousand (39,000) dollars of seven per cent. annual interest coupon bonds of the township of Gill's Creek, and the within described and mentioned nineteen thousand (19,000) dollars of the township of Cane Creek, and nineteen thousand (19,000) dollars of the township of Pleasant Hill, in said Lancaster county, upon the following trust, to wit: That whenever the engineer of the Charleston, Cincinnati and Chicago Railroad Company and a majority of the board of commissioners of said
56 county attested by the clerk thereof with the corporate seal of Lancaster county shall over their hands certify to the said Boston Safe Deposit and Trust Company, trustee aforesaid, that the track is laid and the railroad is ready for operation upon each of the following-described sections, the trustee shall immediately pay over to the Massachusetts and Southern Construction Company the several amounts of the said seven per cent. coupon bonds of the townships aforenamed, as hereinafter set forth and in the order hereinafter set forth.

When the track is laid and the railroad is ready for operation between Rock Hill and Thornwell place, in said township of Cane

Creek, ten thousand (10,000) dollars par value of said bonds of said township shall be delivered by said trust company to said railroad company; and when the said track is laid in the remaining portion of Cane Creek township, nine thousand (9,000) dollars par value of said bonds shall be likewise delivered. When the track is laid and the railroad is ready for operation between the town of Lancaster and the township line of Cane Creek, twenty thousand (20,000) dollars par value of said bonds of the township of Gill's Creek shall be delivered by said trust company to said railroad company, and when the track is laid in the remaining part of said township of Gill's Creek, southward, the remaining nineteen thousand (19,000) dollars par value of said bonds shall be delivered by said trust company to said railroad company. When the track is laid and the railroad is ready for operation between Salem Church in Pleasant Hill township and the township line of Gill's Creek, ten thousand (10,000) dollars par value of the bonds of the said township of Pleasant Hill shall be delivered by said trust company to said railroad company, and when the track is laid in the remaining portion of Pleasant Hill township, southward, nine thousand (9,000) dollars par value of said bonds shall be delivered by said trust company to said railroad company.

But before the said trustee shall deliver the said bonds as aforesaid, the coupons that have matured upon the same shall be detached and surrendered to the said board of commissioners for cancellation, and the said bonds shall not draw interest except from the date of the certificates signed by the said engineer of the Charleston, Cincinnati and Chicago Railroad Company and a majority of the board of commissioners of the county of Lancaster.

Provided further, that the Massachusetts and Southern Construction Company, upon receiving the said seven per cent. annual interest coupon bonds, shall procure to be issued certificates entitling the townships of Gill's Creek, Cane Creek and Pleasant Hill, in said county of Lancaster, to an amount of capital stock at par value in the Charleston, Cincinnati and Chicago Railroad Company, equal to the amount of said bonds so delivered.

In consideration of the premises and the further consideration of one (1) dollar to it in hand paid by the said board of commissioners of Lancaster county, the said Boston Safe Deposit and Trust Company does hereby accept said trust and agrees to and with the board of commissioners of Lancaster county to perform all and singular the duties appertaining thereto with all ordinary care and diligence, and further agrees to be responsible for the safety of all said bonds while they remain in its possession; and if for any cause the Massachusetts and Southern Construction Company, or the Charleston, Cincinnati and Chicago Railroad Company, has
57 not completed said railroad within Lancaster county, by the first day of July, A. D. 1889, further agrees to then deliver all of said bonds then remaining in its possession to the board of commissioners of Lancaster county, or to such parties as they may name, free and clear of the provisions of this trust.

In witness whereof, the said board of commissioners for the county

of Lancaster, as the corporate agent of the townships of Gill's Creek, Cane Creek and Pleasant Hill, has caused these presents to be signed by a majority of its board, and its corporate seal to be hereto affixed, and the said Boston Safe Deposit and Trust Company has also hereunto affixed its name and seal, on this 30th day of November, A. D. 1887.

A. H. PERKINS,
F. B. MOBLEY,
H. N. CLYBURN,
Majority of Board of Commissioners.
BOSTON SAFE DEPOSIT AND TRUST COMPANY,
By F. M. STONE, *President.* [SEAL.]

Attest: EDWARD P. BOND, *Secretary.*

In presence of—(words "attested by the clerk thereof with the corporate seal of Lancaster county" and words "procured to be" interlined before signing. Words "either or" and words "without regard to the order in which said sections are named whether said sections are built from the north southerly or from the south northerly" stricken out and words "and in the order hereinafter set forth" inserted before signing—
IRA B. JONES.

In presence of—
J. W. SHEPARD.
H. L. HEATHFIELD.

The following is the form of the bonds and coupons, omitting the number, signatures, and amounts thereof:

$000. UNITED STATES OF AMERICA. $000.

No. ——.

Cane Creek township,

Lancaster county, South Carolina.

The township of Cane Creek, in the county of Lancaster, in the State of South Carolina is justly indebted to —— ——, or bearer, in the sum of —— dollars and will pay the same to the holder hereof on the first day of July, in the year of our Lord one thousand nine hundred and twelve, at Lancaster, South Carolina, upon the surrender of this bond. The interest, at the rate of seven per cent. per annum, to be paid annually, on the first day of July in each and every year ensuing the date hereof at Lancaster, South Carolina, upon the surrender of, and in accordance with the terms of the interest warrants or coupons hereto annexed.

This bond is issued in pursuance of the power and authority granted by sections 11, 12, 13 and 14 of an act of the General Assembly of the State of South Carolina, approved on the twenty-first

day of December, A. D. 1883, entitled "An act to amend an act entitled 'An act to incorporate the Georgetown and North Carolina Narrow Gauge Railroad Company' and the acts amending the same, and to provide for subscriptions thereto."

58 The board of commissioners of Lancaster county, representing the township of Cane Creek in the county aforesaid, as its corporate agents, having first ascertained the sense of the qualified voters to favor a corporate subscription, by said township, to the capital stock of said railroad company, by an amended act ratified December 22d, A. D. 1885, known as "the Charleston, Cincinnati and Chicago Railroad Company" and subsequently consolidated with the "Charleston, Cincinnati and Chicago Railroad Company as provided by law and ratified and confirmed by the General Assembly of South Carolina, December 24th, A. D. 1886, and said vote for subscription being recorded upon the records of said county of Lancaster and subscribed by said board upon the books of said railroad company, have caused this bond to be issued to pay the subscription of the said township of Cane Creek to the said Charleston, Cincinnati and Chicago Railroad Company," and the whole is done under the authority conferred by and in conformity with, the provisions of said sections of the acts aforesaid.

This bond is not valid unless the certificate endorsed hereon is signed by the trustee.

In testimony whereof the board of commissioners for the county of Lancaster, as the corporate agents of said township, have caused this bond to be signed and to be countersigned by the clerk of the board and attested by the seal of said county of Lancaster, on this first day of July, A. D. 1887.

—— ——, } *Board of Commissioners*
—— ——, } *of Lancaster County.*
—— ——, }

—— ——,
Clerk of Board of the County Commissioners.

Coupon.

$000. Cane Creek township, Coupon No.
County of Lancaster, South Carolina.

Will pay the bearer
July 1st, 1889, dollars
Interest on its bond No. for 000 dollars.
Issued to the Charleston, Cincinnati & Chicago R. R. Co.
At
County treasurer's office,
Lancaster, South Carolina.

—— ——,
Clerk of Board of County Commissioners.

Upon the back of said bonds are the following filing and trustee's certificate:

UNITED STATES OF AMERICA.

Number ——.

Cane Creek township,
(Lancaster county).
PER 7 CENT
BOND.
South Carolina.

——
800.
——

Principal due
1912
Interest payable
July 1st in
—Lancaster—
Lancaster county, South Carolina.

Trustee's Certificate.

The within bond is one of a series amounting in the aggregate to nineteen thousand dollars delivered to us as trustee under trust deed dated 30th day of November, 1887, signed in duplicate one of which is on file in the office of the Boston Safe Deposit & Trust Company of Boston, Mass. and the other on file in the office of the county commissioners of Lancaster county S. C. which see for terms and conditions of the trust.

BOSTON SAFE DEPOSIT
& TRUST COMPANY,
Trustee,
By —— ——, *Treas.*

59 The Boston Safe Deposit and Trust Company has no interest in said bonds except as trustee under this agreement, having received its pay for the custody and delivery of the same.

On the 2nd day of August, 1887, previous to the deposit of these bonds with the trust company, the Charleston, Cincinnati & Chicago Railroad Company agreed to consolidate with the Georgia and Carolina Midland Railroad Company under the name of The Charleston, Cincinnati & Chicago Railroad Company. The agreement contained the following provision: "The mode of carrying this consolidation into effect shall be that described by the law of South Carolina as found in the Gen. Stats. of S. C., 1882, part I, title 12, chapter 40, 1425, 1426, 1427." The directors were required to do everything required to be done to complete said consolidation. The agreement for consolidation was introduced in evidence, but a copy of said contract has not been filed in the office of the secretary of state of South Carolina.

Section 1427 of the General Statutes of South Carolina provides as follows in relation to consolidation of railroads:

SEC. 1427. Upon the making and perfecting the agreement an act of conso-idation as provided in the preceding section, and filing the same or a copy with the secretary of state as aforesaid, the several corporations, parties thereto shall be deemed and taken to be one corporation by the name provided in said agreement and act, possessing within this State all the rights privileges, franchises and subject to all the restrictions, disabilities and duties of each of such corporation- so consolidated.

On the 24th December, 1887, the General Assembly of South Carolina passed the following act:

"No. 442. An act to validate and confirm the consolidation of the Augusta, Edgefield and Newberry Railroad Company with the Atlantic and Northwestern Railroad Company, under the name of the Georgia and Carolina Midland Railroad Company, and the consolidation of the last-named company with the
60 Charleston, Cincinnati and Chicago Railroad Company, and to confer certain powers.

SECTION 1. Be it enacted by the senate and house of representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the agreement entered into by and between the Augusta, Edgefield and Newberry Railroad Company and the Atlantic and Northwestern Railroad Company to consolidate and form one company, under the name of the Georgia and Carolina Midland Railroad Company be, and the same is hereby, validated and confirmed.

SEC. 2. That the agreement entered into by and between the Charleston, Cincinnati and Chicago Railroad Company and the Georgia and Carolina Midland Railroad Company, on the 2nd day of August A. D. 1887, to consolidate and form one company in this State, to be known as the Charleston, Cincinnati and Chicago Railroad Company, be, and the same is hereby validated and confirmed.

SEC. 3. That the said Charleston, Cincinnati and Chicago Railroad Company thus consolidated shall, from the second day of August A. D. 1887, the date of such agreement of consolidation, have and enjoy all the rights, privileges and immunities conferred by sections 1422 and 1434 of the General Statutes of this State.

4TH SEC. That this act shall take effect immediately upon its approval, and all acts or parts of acts, repugnant to this act are hereby repealed. (Approved Dec. 24th, 1887.)" (19 Stats., p. 904.)

The railroad was completed with track laid and ready for operation through the defendant township on the 20th day of August, 1888, and was then examined and accepted by the railroad commission of South Carolina, which made its certificate authorizing the railroad company to open said railroad for public use on and after said August 20th, 1888.

Thereafter the following certificate was presented to the board of county commissioners of Lancaster county and demand made for their signatures thereto:

61 *Engineer's Certificate.*

To board of commissioners of Lancaster county, State of South Carolina:

Charleston, Cincinnati & Chicago Railroad Co.

In accordance to the terms of the trust agreement made and entered into on the 30th day of November, A. D. 1887, by and between the board of commissioners of Lancaster county, State of South Carolina and the Boston Safe Deposit & Trust Company of Boston State

of Massachusetts, I hereby certify that the following-named sections of the railroad contracted to be built by the Massachusetts and Southern Construction Company for the Charleston, Cincinnati and Chicago Railroad Company are completed and in operation, as follows: From the Kershaw county line to Rock Hill S. C., forty miles, being through the townships of Pleasant Hill Gillis Creek, Cane Creek and Waxhaw, Lancaster county, S. C.

(Signed) THOS. E. MATSON,
Chief Engineer.

Johnson City, Tenn., August 20th, 1888.

Which demand the commissioners refused, as follows:

Refusal of Board of Commissioners of Lancaster County to Certify.

This certifies that R. E. Allison, Esq., representing the Charleston, Cincinnati & Chicago Railroad Company and the construction company appeared before the board of county commissioners for Lancaster county and demanded the certificate that the railroad was completed from Camden to Rock Hill through the townships of Pleasant Hill, Gill's Creek and Cane Creek in Lancaster county, upon which certificate the bonds in the hands of the Boston Safe Deposit & Trust Company of Boston, it is proposed, should be delivered to the C. C. & C. railroad, but the Co. comm'rs refuse to give such certificate and thereby deliver said bonds mainly upon the ground, among other things, that the supreme court of S. C. has decided that townships have no authority under the constitution to issue such bonds in aid of railroads. Demand and refusal made at Lancaster S. C., Jan. 12, 1889.

(Signed) IRA B. JONES,
Clk Co. Com'rs, &c.

Mr. Allison at same time exhibited the certificate of the chief engineer to the effect that said railroad was completed through said townships.

(Signed) IRA B. JONES,
Clk Co. Com., &c.

Previous demand had been made for the certificates upon the county commissioners. The first demand for the whole line was August 20th, 1888. Previous demand had been made at Pleasant Hill and Gill's Creek probably between 1st April and 1st May, 1888. No objection was made as to the completion of the road, but the commissioners refused on the ground that townships were not liable to pay the bonds.

62 On the 30th day of November, 1888, after the deposit of said bonds wit- the trust company and after the completion of the railroad through the said township, the supreme court of South Carolina, in the case of Whitesides *vs.* Neely, following Floyd *vs.* Perrin, reported in 30th S. C., page 1 *et seq.*, held that the act of 1883, *supra*, was unconstitutional in so far as it attempted to

authorize townships to subscribe for stock in railroads and to issue bonds in payment of said subscription.

Thereupon the General Assembly of the State of South Carolina, on the 22nd day of December, A. D. 1888, adopted an act in the following terms: "An act to provide for the payment of township bonds issued in aid of railroads in this State. Whereas, certain townships in this State have by their vote expressed their willingness to subject themselves to taxation for the purpose of paying bonds issued by them in aid of certain railroads, and whereas, by reason of a defect in the acts authorizing the issue of said bonds they have been declared invalid; now, therefore, for the purpose of carrying into effect the expressed will of the people of said townships:

"SECTION 1. Be it enacted by the senate and the house of representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same: That the township bonds heretofore issued by county commissioners as the corporate agents of any township in this State in aid of any railroad, by vote of the inhabitants of said township, are hereby declared to be debts of said townships respectively, having authorized the issue of the same. And the interest and principal thereof shall be paid according to the terms of said bonds or debt by the assessment, levying, and collection of an annual tax upon the taxable property in said townships so far as may be necessary, in like manner, and by the same county officials, as the tax levied for county bonds in aid of railroads is assessed, levied, and collected; said tax to be known and styled in the tax books as the township railroad tax, and when collected shall be paid over by the treasurer of the county to the holders of said bonds, as the interest thereon may become due, and according to the terms thereof. All dividends received by or for said townships on stock in railroad companies which have been aided by the said township bonds or debt shall be applied by the county commissioners of the county in which said townships are respectively situated, primarily towards the payment or retirement of said bonds or debt, and the surplus shall be expended in the improvement of the highways within the territorial limits of said township.

"SECTION 2. That no tax shall be levied under the provisions of this act to pay the interest on any township bonds until the railroad in aid of which they were subscribed shall be completed through such township and accepted by the railroad commissioners, nor shall this act be so construed as to authorize the levy and collection of any tax to pay the interest that may have accrued on such bonds before the completion of such railroad, as provided in this section: Provided, that in all townships where taxes have been assessed or collected contrary to the provisions of this act, the county treasurers of the respective counties are hereby required, where such have been paid, to refund the same, and where they have not been paid, to allow a rebate to the extent of such taxes.

"SECTION 3. That this act shall take effect immediately upon its approval." And said act was duly approved on said 22d day of December, 1888.

63 There is no evidence that the people of said township have ever consented to such subscription or to the taxation therefor, except by said petition for an election and the vote therefor under the act of 1883. After the passage of this act, on the 16th day of January, 1889, the Charleston, Cincinnati and Chicago Railroad Company, the Massachusetts and Southern Construction, and the Boston Safe Deposit and Trust Company all joined as relators in an application to the supreme court of South Carolina for a writ of mandamus to compel the county commissioners of Lancaster county to sign the certificate of the completion of the railroad, and thereby deliver said bonds, and the supreme court, on the 16th day of April, 1889, filed its opinion denying the prayer of the petition. Reference is made to the cases of The State *ex rel.* Charleston, Cincinnati and Chicago Railroad Company *vs.* Whitesides, chairman, and others, and State *ex rel.* Dickinson *vs.* Neely, county treasurer, *et al.*, reported in S. C. ——, page —.

After the filing of the above decrees, the following correspondence was had:

BOSTON, MASS., *April 24th*, 1889.

To the chairman and members of the board of commissioners of Lancaster county, S. C., Ira B. Jones, clerk, Lancaster, S. C.

GENTLEMEN: Demand has been made upon the Boston Safe Deposit and Trust Company by the Massachusetts & Southern Construction Company, upon order of the Charleston, Cincinnati & Chicago Railroad Company for delivery to it of nineteen thousand dollars ($19,000) of the 7 % coupon bonds of Cane Creek township, S. C., issued July 1st, 1887, due July 1st, 1912, $39,000 7 % coupon bonds of Gill's Creek township, S. C., issued July 1st, 1887, due July 1st, 1912, and $19,000 7 % coupon bonds, of Pleasant Hill township, S. C., issued July 1st, 1887, due July 1st, 1912—all of which bonds were issued by townships in your county, in aid of the construction of the Charleston, Cincinnati & Chicago railroad.

Demand is made upon us for the delivery of said bonds, with interest adjusted from the time of completion of said railroad through said township, and the acceptance of the same by the railroad commissioners of S. C.

On the evidence furnished us in support of this demand, and considering the judgment of your supreme court, holding trust indenture executed between this company and your board "*ultra vires*, a nullity because not in pursuance of any duty imposed by law" upon your board, it seems to us that the particular form of evidence of the completion of the railroad through townships, prescribed in the void indenture, need not now be considered by us.

Unless therefore you furnish this company with sufficient reasons for not delivering these funds as requested, it is advised that it must hold itself in readiness to make delivery on any day after May 2d, prox.

(Signed) BOSTON SAFE DEPOSIT & TRUST COMPANY,
By F. M. STONE, *Pres't.*

64 In answer to the foregoing letter of the Boston Safe Deposit & Trust Company, the following reply was received:

OFFICE OF COUNTY COMMISSIONERS LANCASTER COUNTY,
LANCASTER C. H., S. C., *May 1st*, 1889.

Boston Safe Deposit & Trust Company, Boston, Mass.

SIRS: You are hereby respectfully notified to hold the papers called township bonds, placed in your hands for safe keeping under trust agreement, by Co. com'rs of Lancaster Co. You are bound by the agreement to hold until the certificate referred to in said agreement is signed by the com'rs; in other words under said agreement you are agent of Co. com'rs and hold bonds as such agent under stipulation that you will not deliver until permission is given by Co. com'rs for their delivery in the specified way. We hold that the bonds in your hands are void as such, and if you part with the possession of them, you must return them to the Co. com'rs. If you deliver to any other party, you will do so in defiance of your agreement.

You fly-blow the bonds (if possible) because by the force and terms of the bonds and the endorsement you are required to make, holders must take notice of the terms of the trust agreement. If the contract under which you hold bonds as agents is *ultra vires* so far as com'rs are concerned, you cannot escape your obligation on that ground. If the contract is *ultra vires* your duty is to return the bonds to your principal, the Co. com'rs as agents of the townships, and not to assume authority in the premises. Your possession of the bonds is just as much *ultra vires* as the contract under which you get possession. If you turn over bonds in defiance of our objection we would feel bound to let the public know your breach of trust, and in such case we fail to see how bondholders will be benefitted. You must either hold the bonds or return them to the Co. com'rs of Lancaster county, and leave claimants to whatever legal remedy they may have to get possession of the bonds, or recover the "debt" referred to in act of 1888 &c.

Very respectfully,

(Signed) J. H. HARPER,
H. N. CLYBURN,
Co. Com'rs L. C.

Attest:
[SEAL.] IRA B. JONES, *Clerk.*

The assessed value of all taxable property in Lancaster county at the times hereinafter mentioned was as follows:

Fiscal year ending October 31st, 1886.....	$1,870,893 00
" " " " 1887.....	1,842,799 00
" " " " 1888.....	1,832,230 00
" " " " 1889.....	2,047,385 00

The bonded debt of Lancaster county at the times hereinafter mentioned was as follows:

	June 26th, 1886 (date of vote for subscription)....	$97,300
65	March 17th, 1887 (date of subscription on R. R. bonds)	97,300
	August 20th, 1888 (date of completion of R. R. in township).....	97,000
	Dec'r 22nd, 1888 (date of adoption of act of 1888).....	97,000
	Amount of outstanding bonds at present date.....	94,500

The assessed value of taxable property in Gill's Creek township, exclusive of railroad property, was as follows:

Fiscal year ending October 31st, 1886.....		$512,444
" " " " "	1887.....	486,968
" " " " "	1888.....	511,422
" " " " "	1889.....	520,377

The assessed value of taxable property in Pleasant Hill township, exclusive of railroad property, was as follows:

Fiscal year ending October 31st, 1886.....		$238,409
" " " " "	1887.....	241,212
" " " " "	1888.....	239,198
" " " " "	1889.....	246,558

The assessed value of taxable property in Cane Creek township, exclusive of railroad property, was as follows:

Fiscal year ending October 31st, 1886.....		$220,330
" " " " "	1887.....	231,816
" " " " "	1888.....	215,634
" " " " "	1889.....	213,066

Assessment of railroad property in Lancaster county, lying in Gill's Creek, Pleasant Hill, and Cane Creek townships:

Fiscal year ending Oct. 31st, 1886, Cheraw & Chester R. R, assessed at $3,000 per mile.....	$20,300
Fiscal year ending Oct. 31st, 1887, assessed at $2,500 per mile.....	16,500
Fiscal year ending Oct. 31st, 1888, assessed at $2,500 per mile.....	16,500
Fiscal year ending Oct. 31st, 1889, assessed at $2,500 per mile.....	16,500

This railroad lies wholly within Gill's Creek and Cane
66 Creek townships, and the above assessment is to be apportioned between these two townships, most of it lying in Cane Creek township.

The Charleston, Cincinnati and Chicago railroad lies in Pleasant Hill, Gill's Creek, Cane Creek, and other townships in Lancaster county. On the 18th day of February, 1889, this railroad was first returned and assessed for taxation at the rate of $5,000 per mile; total assessment, $151,900. This assessment was for the fiscal year beginning October 31st, 1888. Returns of all property are made in

the months of January and February of each year, and such property only as the tax-payer owns on the 1st day of January of that year is assessed for taxation.

First assessment of telegraph property in Lancaster county was made 29th January, 1889, for such property owned January 1st, 1889, as follows: Whole line on the Cheraw and Chester railroad and on the Charleston, Cincinnati and Chicago railroad was assessed at $961.85.

There has never been any apportionment of railroad and telegraph property among the townships in which the same may be for township taxation, but it has been ascertained by actual measurement for the purposes of this case that of the Cheraw and Chester railroad five miles and 784.3 yards lie in Cane Creek and 1,153.24 yards in Gill's Creek, and that of the Charleston, Cincinnati and Chicago railroad seven miles and 4,601 feet lie in Cane Creek, five miles 1,997 feet in Gill's Creek, and eleven miles 4,859 feet in Pleasant Hill.

Complainant seeks to have delivered to it by the said townships in Lancaster county the several amounts of township bonds referred to in the trust agreement herein set forth, aggregating seventy-seven thousand dollars.

This cause was heard by Judges Bond and Simonton at the April term of said court with seven other cases involving substantially the same questions and facts, except that in this case the further question was made that the said $19,000 of bonds exceeded eight per cent of the assessed value of the taxable property of the township.

These seven other cases were by the same complainant against the Boston Safe Deposit and Trust Company and the Townships of Cherokee, Catawba, Broad River, Ebenezer, and York, in the county of York, and the Townships of Pleasant Hill and Gill's
67 Creek, in Lancaster county. The opinion of the court was expressed in the case against Cherokee township and is as follows, the court reserving its decision in the Cane Creek township:

DISTRICT OF SOUTH CAROLINA:

In the Circuit Court, Fourth Circuit.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY
vs.
THE TOWNSHIP OF CHEROKEE, York County, South Carolina, and THE BOSTON SAFE DEPOSIT AND TRUST COMPANY.

Before Bond and Simonton, JJ.

SIMONTON, *J.*, delivered the opinion of the court, BOND, J., concurring:

"In 1878 the General Assembly of South Carolina incorporated the Georgetown and North Carolina Narrow Gauge Railroad Company. This act was amended in 1882, 1883, and 1885. The only

amendments which bear on this case are one by which the name of the corporation was changed into that of the Charleston, Cincinnati & Chicago Railroad Company, and the one providing that townships on certain conditions were authorized to subscribe to this road. This last amendment is in these words, 18 Statutes at Large (So. Ca.), 366: 'It shall and may be lawful for any county or township interested in the construction of the said railroad to subscribe to its capital stock such sums as a majority of its voters, voting at an election for that purpose, may authorize the county commissioners to subscribe, which subscription shall be made in coupon bonds, payable twenty-five years after the date thereof, and to be of the denomination of $100, $500, and $1,000. Such counties and townships as shall vote for subscription are hereby created bodies politic and corporate under their respective names and are vested with powers necessary for carrying out the provisions of this act, and the commissioners
68 of any county so incorporated or of any county in which shall be situated any township so incorporated are hereby declared to be the corporate agents of such county or township.' At the time of the passage of this act there was no provision in the constitution of South Carolina or in any act of assembly of that State conferring any corporate or other function or duty on townships. They were simply territorial names covering a certain portion of a county, used for convenience only. On September 5th, 1885, an election was held under this act in Cherokee township, York county, and a subscription of $25,000 voted to the capital stock of this railroad company. Thereupon the county commissioners of York county made the subscription and prepared and executed the bonds. By an agreement made between the railroad company, The Massachusetts and Southern Construction Company (the complainants), and the county commissioners these bonds were placed in the hands of the Boston Safe Deposit and Trust Company to be delivered to the complainant as the construction progressed between certain points in this township, so that upon the completion of the road through the township all the bonds should be delivered. The delivery was to be made upon the certificate of the engineer of the complainants that the road had been so completed, endorsed by the chairman of the board of county commissioners. Upon this agreement the road was built through this township. It was accepted by the railroad commissioners on December 1st, 1888. Sixteen thousand six hundred dollars of bonds have been delivered to the complainants, leaving $8,400 still in the hands of the Boston Trust Company. The chairman of the county commissioners of York county refuses to endorse the certificate of the engineer that the road has been completed through Cherokee township, although he admits this fact to be true. The Boston Trust Company has endorsed the bonds, as required by the agreement, and have them in hand ready for delivery. In fact, the company is anxious to deliver them and are only waiting the action of the chairman of the county commissioners. They have no claim upon and no interest whatever in the
69 bonds. The bill is against the township setting out these facts, praying a specific performance on the part of the town-

ship of its contract, and the delivery to complainant of these bonds and for general relief. The refusal of the chairman of the board of county commissioners is based on this ground: The supreme court of South Carolina at the April term, 1888, after these bonds had been prepared, signed, and deposited with the Boston Trust Company, decided that township bonds prepared and issued under the provisions of an act in this respect like the one providing for these bonds were issued without constitutional authority and were void (Floyd *vs.* Perrin, 30 S. C., 1). It may be noted that the chairman of the county commissioners was not bound under the agreement to express or pass any opinion on the validity of these bonds, nor was he to exercise any discretion whatever. All that he was to do under the agreement was to state a fact, to wit, that the railroad was built through the township. The consequences of that fact he was in no sense responsible for, as the board had already done everything toward the issue of the bonds upon the occurrence of the fact he was called upon to state. The case of Floyd *vs.* Perrin having been decided, the legislature passed in December, 1888, an act to provide for the payment of township bonds issued in aid of railroads in this State (20 Stat. at Large, 12). The constitutionality of this act has been sustained in State *vs.* Whitesides, 20 S. C., 579. The act recites that certain townships in this State have by vote expressed their willingness to be taxed to pay bonds issued by them in aid of certain railroads, which bonds by reason of a defect in the acts authorizing their issue have been declared invalid. For the purpose of carrying into effect the expressed will of the people of these townships it is enacted that the township bonds heretofore issued by county commissioners as the corporate agents of any township in this State in aid of any railroad by vote of the township are hereby declared to be debts of the township which authorized the issue of the same, the interest and principal to be
70 paid by a tax levied annually on such townships for that purpose to the holders of such bonds as the interest may become due according to the terms thereof. All dividends on stock received for such bonds are pledged to the payment of such interest. No tax shall be levied until the road is completed through the township and accepted by the railroad commissioners, and no interest which accrued on said bonds before such completion is to be paid.

This act distinctly recognizes and imposes on the townships these bonds as a debt of the township to be paid by the taxes levied on it and not a debt to take effect from the passage of the act, but a debt payable as to its interest from the day the road is completed through the township and is accepted by the railroad commissioners. The bonds issued before the act was passed are recognized as in existence; the issue of no new bonds is required, and such bonds are declared to be the debt of the township according to their terms—that is to say, the bonds, the amount of the debt, the interest payable thereon, the time for the payment of interest, the time for payment of principal, and the person to whom payable. As the taxes are to be levied annually and when collected to be paid to

the holders of said bonds, such holders are entitled to the possession of the bonds as muniments of title. Such is the result of the opinion of the supreme court of South Carolina in State *vs.* Neely, 30 S. C., 605. If, as is contended, this is but the expression of an opinion upon a matter not necessary to the decision of a question before the court and so, *obiter dictum*, we may construe the act for ourselves and, doing so, have reached the same conclusion. The railroad having been completed through the township, the complainant is entitled to possession of the bonds; but the defendant insists that this right cannot be enforced under these proceedings. It objects to the jurisdiction of the court because the defendant, The Boston Trust Company, is a citizen of the same State as the complainant; but no relief is asked against that company, no delict of the company has been set up, no act of it complained of. The pleadings and testimony all show that it is a mere stake-
71 holder (?), with no interest whatever in these bonds, with no interest in the controversy as to their validity. It is called in to see merely that the defendant township does an act in fulfillment of its obligation to complainant; then the trust company can complete its duty. (Foster's Fed. Proc., sec. 18, page 26.)

It is said that the chairman of the board and the clerk of the board should be parties. The former is one of the agents of the defendant corporation and the latter is his agent. The only act that they can do is as such agents for and on behalf of the principal to certify that the road has been completed through the township. Surely when the principal is present the court can deal with it directly; can ascertain as a matter of fact whether the road has been completed through the township, and if upon that fact depends the delivery of the bonds the complainant can order and direct such delivery. It is also alleged that complainant in this case is the assignee of a corporation of the State of South Carolina and cannot sue a citizen of the State of South Carolina in this court. The relief sought in the bill is the possession of certain bonds to be held and used as muniments of title elsewhere. The bill does not seek to collect these bonds or coupons on them or to collect the debt or any interest on it. It comes wholly within Deshler *vs.* Dodge, 16 How., 621. The question is as to the form of a decree. The bonds are to be delivered to complainant when the road has been completed through the township and when the agent of the defendant certifies to that fact on the engineer's certificate. The latter is in the record. The defendant's agent refuses to endorse it. The fact remains, however, that the road has been completed through the township. The certificate providing for the delivery of the bonds was for mutual convenience of the parties. The court cannot permit that which was intended for mutual convenience to be used by one of the parties as an unreasonable obstruction. The act of the chairman in endorsing the certificate would be an act binding his principal as to the fact of the completion of the road. For this purpose only would it be desirable. The principal being in court,
72 the decree can bind it as effectually to the admission of this fact as his certificate would. It is ordered that Boston Safe

Deposit and Trust Company deliver to the complainant the bonds properly certified."

73 And on the 4th day of November, 1890, came into court the complainant, by its solicitors, Lord & Hyde, and filed the following order of reference:

Order of Reference.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY }
vs. }
THE CANE CREEK TOWNSHIP. }

On motion of Lord & Hyde and with the consent of C. R. Miles, it is—

Ordered that this case be referred to G. W. Dingle, referee, to take such testimony as may be produced before him as to the assessed value of the property in the defendant township at the date when the subscription to the Charleston, Cincinnati & Chicago railroad was voted, at the date when said subscription was made by the county commissioners, and at the date when the act of December 22nd, 1888, was passed and approved, and what debt, if any, existed at either of these periods for which said township was liable in whole or in part.

CHARLES H. SIMONTON,
U. S. Judge.

4th November, 1890.

Filed 4th November, 1890.

74 And on the 20th day of January, 1891, came into court the special master, G. W. Dingle, and filed the following report:

Master's Report.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY }
vs. }
THE TOWNSHIP OF CANE CREEK, in the County of Lancaster and State of South Carolina. }

An agreed statement.

Assessed Value of Taxable Property in Cane Creek Township, Exclusive of Railroad Property.

1. Fiscal year ending October 31st, 1886..... $220,330 00

This period covers date of vote for subscription, viz., June 26th, 1886.

2. Fiscal year ending October 31st, 1887..... .... $231,816 00

This period covers date of actual subscription by county commissioners March 17th, 1887.

3. Fiscal year ending October 31st, 1888..... $215,634 00

This covers date of signing bonds and deposit with the Boston Trust Company November 30th, 1887, and also date of completion of the railroad through defendant township, viz., August 20th, 1888.

4. Fiscal year ending October 31st, 1889..... $213,066 00

This covers date of adoption of act of 1888, viz., December 22nd, 1888.

Assessment of Railroad Property in Lancaster County Lying Partly in Defendant Township.

75	Fiscal year ending October 31st, 1886, Cheraw & Chester railroad, 6.6 miles, assessed at $3,000 per mile; buildings, $500.....	$20,300
	Fiscal year ending October 31st, 1887, Cheraw & Chester railroad, 6.4 miles, assessed at $2,500 per mile; buildings, $500.....	16,500
	Fiscal year ending October 31st, 1888, Cheraw & Chester railroad, 6.4 miles, assessed at $2,500 per mile; buildings at $500.....	16,500
	Fiscal year ending October 31st, 1889, Cheraw & Chester railroad, 6.4 miles, assessed at $2,500 per mile; buildings at $500.....	16,500
	For this fiscal year the Charleston, Cincinnati & Chicago railroad, on the 19th day of February, 1889, was first assessed for taxation at the rate of $5,000 per mile; total assessment in the county, including buildings, &c.	151,900

Returns of property are made after the 1st day of January of each year, and the owner is assessed only on property owned on the 1st day of January of each year. For the assessment and collection of taxes the fiscal year begins November 1st and ends October 31st of each year. First assessment of telegraph property in Lancaster county was made on the 29th January, 1889, as follows:

By Western Union, including the whole of the lines both on the Cheraw & Chester and the Charleston, Cincinnati & Chicago railroads, total amount, $961.85.

There has been no apportionment of railroad property in Lancaster county among the townships in which the same may be for township taxation, but by actual measurement for the purposes of this case it has been ascertained that five miles seven hundred and eighty-four $\frac{30}{100}$ yards of the Cheraw & Chester railroad lies in Cane

Creek township, and there has been no change in the length of said railroad in said township since its construction. The depots of the Cheraw & Chester railroad assessed at $500, above stated, and the side track of said railroad, amounting to 1,482 feet, all lie
76 out of Cane Creek township. The main track of the Cheraw & Chester railroad in Gill's Creek township is by actual measurement 1,153.24 yards. This railroad in Lancaster county lies wholly in Gill's Creek and Cane Creek townships.

Of the C., C. & C. R. R., seven miles and 4,601 feet is in Cane Creek township.

The assessed value of all taxable property in Lancaster county was as follows:

Fiscal year ending October 31st,	1886	$1,870,893
" "	1887	1,842,799
" "	1888	1,832,230
" "	1889	2,047,385

The bonded debt of Lancaster county was as follows at dates named:

June 26th, 1886	$97,300
March 17th, 1887	97,300
August 20th, 1888	97,300
December 22nd, 1888	97,000

Amount outstanding at present date, $94,500.

Cane Creek township has no bonded debt as a township other than the debt sought to be declared in these proceedings, amounting, if valid, to $19,000.

The bonds of Pleasant Hill township, in Lancaster county, and of Gill's Creek township, in said county, decreed to be delivered to complainant by this court, aggregate $58,000.

It is a fact that the telegraph line on the Cheraw & Chester railroad from Lancaster to Chester, through Gill's Creek and Cane Creek townships, was constructed previous to November 1st, 1885, and has been in operation ever since, but was not assessed for taxation until 29th January, 1889.

This, however, is admitted, subject to Mr. Jones' objection that it is totally irrelevant.

We agree to the foregoing as a correct statement of the
77 facts bearing upon the matters referred to G. W. Dingle, as special referee, by order dated 4th day of November, 1890, and consent that said referee shall report the same as if established before him.

IRA B. JONES,
Sol'r for Def'd't Township.

I think the facts above are correct as far as they go.

R. E. ALLISON.

We agree to the above statement of facts.

SAMUEL LORD,
For Lord & Hyde.
CH. RICHARDSON MILES,
Counsel for Def'dt Townships.

Respectfully submitted.

G. W. DINGLE,
Special Master.

January 20th, 1891.

Filed 20th January, 1891.

78 And on the 25th day of February, 1891, this cause came up for a rehearing. The pleadings and testimony were read to the court, and after hearing arguments by Messrs. Lord & Hyde, on behalf of complainants, and Ira B. Jones, on behalf of the defendant, and Mr. Hyde, in reply, the court rendered the following decree:

Decree.

THE UNITED STATES OF AMERICA,)
District of South Carolina.)

In the Circuit Court.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY)
vs.)
CANE CREEK TOWNSHIP, in the County of Lancaster, *et al.*)

The bill is brought to inforce the delivery of $19,000 bonds of the Cane Creek township, issued in aid of the construction of the Charleston, Cincinnati & Chicago Railroad Company through that township. The defendant rests on the unconstitutionality of this debt.

The constitution of South Carolina, article 9, section 17 (18 Stat. at Large, 690), provides:

Any bonded debt hereafter incurred by any county, municipal corporation, or political division of the State shall never exceed eight per cent. of the assessed value of all the taxable property therein.

It is contended that $19,000 exceeds eight per cent. of the assessed value of all the taxable property in the township at the date the debt was incurred.

The first question, then, is, When was the debt incurred?

The power of subscribing to the railroad was first inserted in the A. A., 21st February, 1883, 18 Statutes at Large (So. Ca.),
79 365. The exercise of the power was made in the vote of the people of the township in June, 1886. The bonds were executed and deposited with the Boston Safe Deposit and Trust Company, as escrow, 14th January, 1888. In Floyd *vs.* Perrin, 30 So. Ca., 1, the supreme court of South Carolina decided, April term, 1888, that township bonds of this character and issued under like authority

were invalid. In December, 1888, 20 Stat. at Large (So. Ca.), 12, the General Assembly passed an act to provide for the payment of township bonds issued in aid of railroads in this State. The supreme court discussed this act in The State *vs.* Neely, 30 Fed. Rep., 604, and held this act to be constitutional. Construing the act, they held that, in passing it, the legislature exercised its own original power and imposed a tax on the property within the bounds of the township for the purpose of constructing the railroad within it—that is to say, the people of the township having, by their vote, expressed their willingness to subscribe to and to be taxed for the construction of the railroad by coupon bonds, payable with certain interest and at a certain time, the legislature approved this action, *proprio vigore* imposed the debt on the township, and ordered the levy of the tax upon the taxable property therein. The debt and the tax owe their authority to this act of 1888, and the date of this act must be taken as the time when the debt was incurred, 22nd December, 1888.

What was the assessed value of all the taxable property in this township at this date? Assessed value; not its estimated or actual value, but what was the valuation fixed upon it by competent authority for the purposes of taxation?

From the agreed statement of facts it appears that for the fiscal year ending October 31st, 1888, the assessed value of taxable property other than railroad property within Cane Creek township was $215,634; that during the next succeeding fiscal year it was $213,066. We will take the first..... $215,634

There are two railroads in that township, the Chester
80 and Cheraw and the Charleston, Cincinnati and Chicago railroad. The part of the first named is and always has been assessed within this township at..... 16,500

$232,134

The property of the last named railroad was not assessed for taxation until 19th February, 1889, after the passage of the act of 1888. It cannot be included in the basis upon which the percentage is estimated in order to ascertain if this subscription is within the constitutional limit. Taking, therefore, $232,134 as this basis, eight per cent. is $18,570.72, less than the $19,000. The act having created a debt exceeding in amount the limit fixed by the constitution, the whole debt is invalid. The court cannot scale it down so as to bring it within the lawful limit. Hedges *vs.* Dixon County, 37 Fed. Rep., 304.

The bill must be dismissed and it is so ordered.

25th February, 1891.

HUGH L. BOND, *Ct Judge.*
CHARLES H. SIMONTON,
U. S. Judge.

Filed 25th February, 1891.

81 And on the 27th day of February, 1891, the court passed the following order dismissing the bill:

Order Dismissing Bill.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY
vs.
CANE CREEK TOWNSHIP, in Lancaster County, *et al.*

The case came up to be heard upon the pleadings and an agreed statement of facts reported by the special master. Upon due consideration thereof—

It is ordered, adjudged, and decreed that the bill be dismissed with costs.

27th February, 1891.

CHARLES H. SIMONTON,
U. S. Judge.

Filed 27th February, 1891.

Complainant's Assignments of Error.

The complainant assigns as error that the circuit court erred in not including in its estimate of the assessed value of the township property the property of the Charleston, Cincinnati & Chicago Railroad Company, because the return and assessment of said property, though made in January, 1889, related back, when made, to the beginning of the fiscal year, to wit, the 1st of November, 1888.

2nd. Because the court erred in dismissing the bill.

82 And on the 2nd day of March, 1891, came into court the complainant, by its solicitor, Samuel Lord, and filed the following notice of appeal and allowance of appeal:

Notice and Allowance of Appeal.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY
vs.
THE TOWNSHIP OF CANE CREEK and THE BOSTON SAFE DEPOSIT AND TRUST COMPANY.

The above-named plaintiff, The Massachusetts and Southern Construction Company, conceiving itself aggrieved by the order entered on 27th February, 1891, in the above-entitled proceedings, doth hereby appeal from said order to the Supreme Court of the United States and prays that this appeal may be allowed, and that a transcript of the record and proceedings and papers upon which

said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

SAMUEL LORD,
Plaintiff's Att'y.

And now, to wit, March 2nd, 1891—
It is ordered that the appeal be allowed as prayed for.

CHARLES H. SIMONTON,
U. S. Judge.

2nd March, 1891.

Filed 2nd March, 1891.

83 And on the 5th day of March the court passed the following order fixing the amount of the supersedeas bond:

Order.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY
vs.
CANE CREEK TOWNSHIP, in Lancaster County, *et al.*

The amount of the supersedeas bond on appeal in this case is hereby fixed at two hundred and fifty dollars.

CHARLES H. SIMONTON,
U. S. Judge.

5th March, 1891.

Filed 5th March, 1891.

84 And on the 12th day of March, 1891, came into court the complainant, by its solicitor, Samuel Lord, and filed the following supersedeas bond:

Supersedeas Bond.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court. In Equity.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY,
Appellant,
vs.
THE TOWNSHIP OF CANE CREEK, Lancaster County, South Carolina, Appellee.

Know all men by these presents that we, R. M. Marshall and Alex. W. Marshall, of Charleston, South Carolina, are held and firmly bound unto the above-named Township of Cane Creek in the sum of two hundred and fifty dollars, to be paid to the said Township of Cane Creek; for the payment of which, well and truly

to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 11th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas the above-named Massachusetts and Southern Construction Co. has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit — of the United States for the district of South Carolina:

85 Now, therefore, the condition of this obligation is such that if the above-named Massachusetts and Southern Construction Co. shall prosecute said appeal to effect and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

R. M. MARSHALL. [L. S.]
ALEX. W. MARSHALL. [L. S.]

In presence of—
SAMUEL LORD.

86 THE UNITED STATES OF AMERICA, }
District of South Carolina, Fourth Circuit. }

In the Circuit Court.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of all the records, proceedings, and decree, &c., in the case of The Massachusetts and Southern Construction Company, complainant, against The Township of Cane Creek, in the county of Lancaster and State of South Carolina, defendant, rendered as aforesaid, together with all the proceedings had in the cause relating to the same.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston and district of South Carolina, this the 12th day of March, A. D. 1891.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

87 We agree that the above eighty-six pages shall constitute the record in this case, and that in the argument before the Supreme Court the counsel shall be restricted to the assignments of error herein set forth.

SAMUEL LORD.
IRA B. JONES.

Endorsed on cover: Case No. 14,550. S. Carolina C. C. U. S. No. 112. The Massachusetts & Southern Construction Company, appellant, *vs.* The Township of Cane Creek, Lancaster county, South Carolina. Filed March 30, 1891.

(155-285)

Office Supreme Court U. S.
FILED.
OCT 26 1894
JAMES H. McKENNEY,
CLERK.

BRIEF OF APPELLANT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894

No. 112.

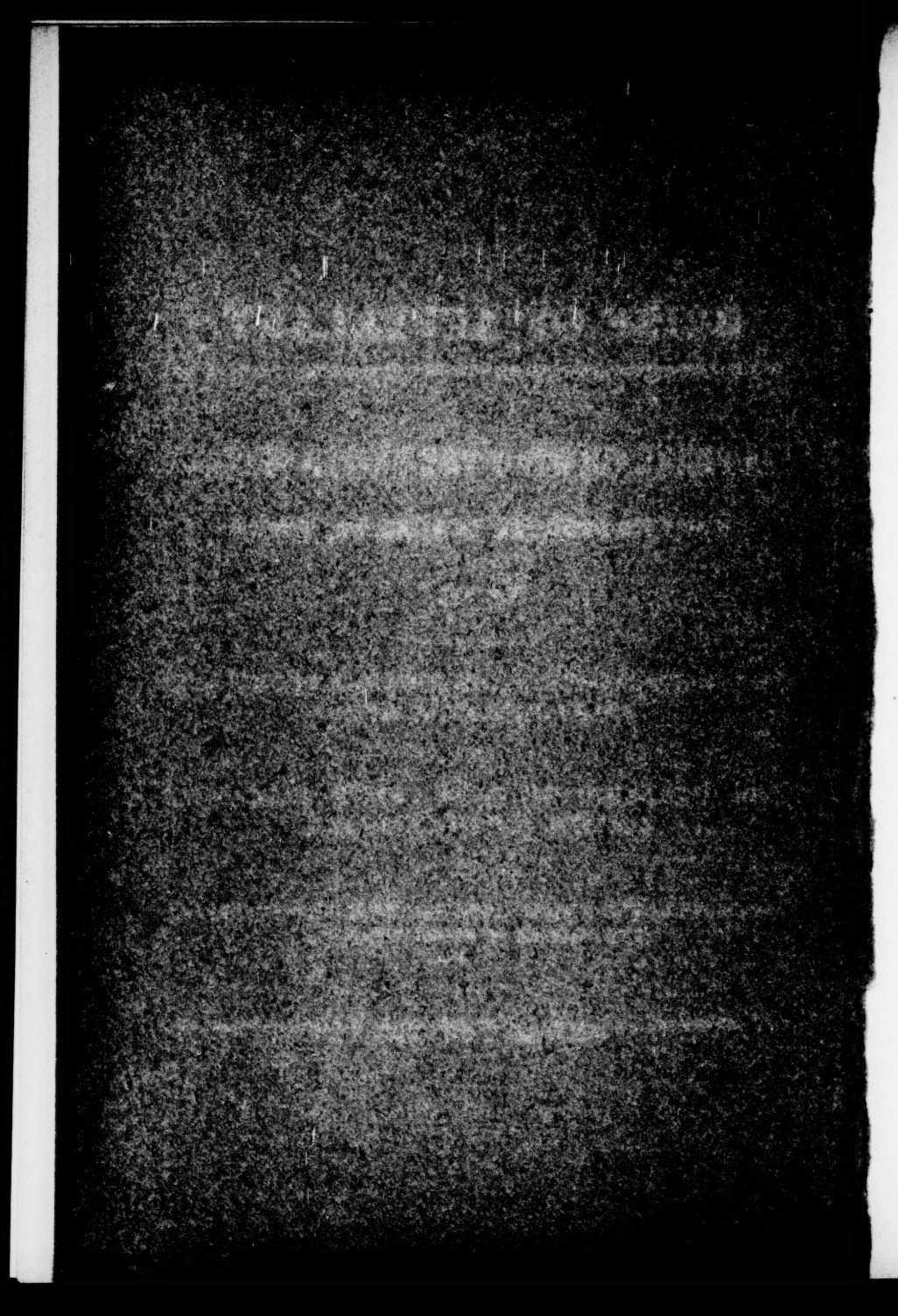
THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY, APPELLANT,

vs.

THE TOWNSHIP OF CANE CREEK, LANCASTER COUNTY, SOUTH CAROLINA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

LUCAS & RICHARDSON CO. PRINT, CHARLESTON, S. C.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.—No. 112.

APPEAL FROM U. S. CIRCUIT COURT—DISTRICT COURT OF S. C.

1

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY, APPELLANT.

vs.

THE TOWNSHIP OF CANE CREEK, LANCASTER COUNTY, SOUTH CAROLINA.

BRIEF OF APPELLANTS' ATTORNEYS.

2

STATEMENT OF CASE BY APPELLANT.

This is an appeal from a decree dismissing the bill, because the Township Bonds involved in the cause were in excess of the limit allowed by the Constitution of South Carolina.

Under Statutes of South Carolina, defendant had been created a corporation, and vested with power to subscribe 3
to the capital stock of the Charleston, Cincinnati and Chicago Railroad Company, in coupon bonds. By its corporate authorities it did so subscribe, and issued $19,000 of bonds to pay for said subscription, on 30th November, 1887. Defendant placed these bonds in the hands of the Boston Safe Deposit Company, under an agreement of that date, whereby the bonds were to be delivered to the plaintiff, who was engaged in building the road—one instalment when a part of the work was finished and the last when the road should be completed through said township, 4

which completion should be evidenced by a certificate issued by the engineers of said road, and the majority of the Board of County Commissioners of Lancaster County, (who had been also made the corporate agents of the defendant, a township in said county), attested by the clerk thereof, with the corporate seal of the county. The said Railroad Company assigned all their interests in said bonds to the plaintiff.

The road was completed through said Township on 18th August, 1888, and it was so certified to by the Railroad
5 Commissioners of South Carolina. The fact was also certified to by the engineers of said road on 20th August, 1888.

On 30th November, 1888, the Supreme Court of South Carolina, in the case of Floyd vs. Perrin, 30 S. C., p. 1, decided that the Statute authorizing townships to subscribe in aid of railroads as aforesaid, was unconstitutional.

On December 22d, 1888, the Legislature of South Carolina passed an Act imposing upon the townships as debts their respective subscriptions evidenced by the bonds issued to pay for them, and providing for the payment of the
6 same. This Act was held to be constitutional.

State *ex rel.*, C. C. C., vs. Whitesides, 30 S. C., p. 579.

The County Commissioners and their clerk were then applied to by plaintiff and the Railroad Company for their certificate on January 12th, 1889. Their demand was refused, mainly on the ground that the Supreme Court of South Carolina had decided that townships have no authority, under the constitution, to issue such bonds in aid of railroads. Mandamus in Supreme Court of South Carolina
7 to compel the County Commissioners to give the certificate failed, on the ground that the Act providing for the issue of the bonds was unconstitutional.

Thereafter on 24th April, 1889, the Deposit Company notified the County Commissioners of a demand upon it by plaintiff for the bonds, and stated that on the evidence furnished, it must deliver them, unless furnished with sufficient reasons to the contrary. The County Commissioners notified the Deposit Company to hold the bonds, claiming that they were void, and threatening to expose to the public
8 their breach of trust if they were given to plaintiff.

Plaintiff then brought this bill alleging substantially the foregoing and praying that the defendant be required to specifically perform its agreements, by assenting to the delivery of said bonds, and that the Trust Company do deliver them to complainant. The Deposit Company, answering, sets forth its notification to County Commissioners, of 24th April, 1889, which it states, was made believing that complainant had complied with all the conditions of the trust, excepting the certificate of the County Commissioners, and that defendant had refused to sign without good cause—that to avoid litigation, it has not paid 9
over the bonds, but it is ready to do so whenever it can be protected in so doing—that it has no interests in the bonds nor any claim for services in connection therewith, the same having been fully paid.

Several questions were raised by defendant, all except one being substantially those in seven other cases of like character, by same complainant against other townships, heard at the same term. In this case the further question was made under a provision of the Constitution of South Carolina—Art. IX. Sec. 17, to the effect that the bonded 10
debts incurred by a municipality shall not exceed eight per cent. of the assessed value of all the taxable property therein—that the $19,000 of bonds exceeded 8 per cent. of the assessed value of the taxable property of the township. The decree in the seven cases, was in favor of complainant. In this case the Court held that the debt was incurred 22d December, 1888, by force of the Statute of that date. That the assessed value of property of the township for the fiscal year, ending 31st October, 1888, was $232,134. That property of the Charleston, Cincinnati and Chicago Rail- 11
road in the township was not assessed until February 19th, 1889, and could not be included.

That therefore $19,000 of bonds was in excess of 8 per cent., (the constitutional limit,) of $232,134, and so the whole debt was invalid, and dismissed the bill. We will add, that if the railroad property assessed in February, 1889, ($35,000) were included, the issue of bonds would not be in excess.

In South Carolina returns of all property are made in the months of January and February of each year, and such 12

property only as the taxpayers own on first day of January of that year is assessed for taxation. Record, folio 66. The fiscal year commences 1st November of each year and ends on succeeding 31st October.

SPECIFICATION OF ERRORS RELIED ON.

1. That the Court erred though the debt was incurred on
13 22d December, 1888, in not including in the assessed value of the property to be compared with the debt, the railroad property of C. C. C. R. R. assessed in February, 1889, but on the contrary, should have held, that the date 22d December, 1888, being in the fiscal year, 1887–8, and the assessment of the railroad property being for the same fiscal year, the assessment of the railroad property should be added to the other assessments, and that if so added, the bonds were not in excess of the constitutional limit.

2. Appellants submit that the Circuit Court erred in hold-
14 ing that the debt represented by the bonds, was incurred 22d December, 1888, but on the contrary, should have held that though the bonds owe their validity to the Act of 22d December, 1888, the debt is not incurred in the sense of the Constitution, until either the bonds ought to have been delivered out of escrow or until they shall be so delivered.

ARGUMENT.

15

Appellant contends that the bill should not have been dismissed, because the bonds were not issued in excess of the constitutional limit. The argument will be presented under the following propositions:

I.

(*a.*) *If the date of the Act of 22d December, 1888, is the date when the assessed value of property is to be compared with the debts, then the constitutional limit has not been ex-*
16 *ceeded, because the property of the C. C. & C. R. R. should be*

added to the amount of the assessment, taken as the basis of comparison by the Circuit Court, and if so added, the limit has not been exceeded.

(b.) The railroad property should be added, because an assessment for any fiscal year, whenever made, is the assessed value of the property for every part of the fiscal year, and is the proper basis of comparison with a bonded debt, incurred at any time in that fiscal year.

The Constitution of South Carolina, Art. IX, Sec. 17 provides: 17

"Any bonded debt, hereafter incurred by any County, municipal corporation, or political division of this State, shall never exceed eight per cent. of the assessed value of all the taxable property therein."

The first obvious question is, when was the bonded debt incurred?

The Circuit Court held that the debt owes its validity to the Act of 22d December, 1888, and that the date of that 18
Act, 22d December, 1888, must be taken as the time when the debt was incurred. Record, folio 79.

That Act is set out in Record, folio 62. Sec. 1, provides "That the township bonds heretofore issued by County Commissioners as the corporate agents of any township in this State, in aid of any railroad, by vote of the inhabitants of said township, are hereby declared to be the debts of said townships respectively, having authorized the issue of the same."

This Act was, by decisions of the Supreme Court of South 19
Carolina, held constitutional and valid, and thus a township having declared its willingness to be taxed to aid in the construction of a railroad through its limits, such railroad is as to such township a public purpose, and the Legislature may, in its sovereign capacity, impose upon such community a tax to pay for such subscription, and accept the bonds so issued, as the representative of the debt of the township so created.

See State vs. Whitesides, and
State vs. Neely, 30 S. C., 579, 587. 20

It will be noticed at the outset, that the Act relates to bonds "heretofore issued," and it may be urged that these bonds were never issued, because they were not absolutely delivered, but were placed in escrow. This, we submit, is a strained and narrow construction, and against the clear expressed intent of the Act. The Act was induced by the adverse decision in Floyd vs. Perrin, and was intended, as far as practicable, to preserve good faith with those who had gone to heavy expense under contracts based upon faith in the validity of the bonds. The preamble re-
21 cites, "Whereas, certain townships in this State have, by their vote expressed their willingness to subject themselves to taxation for the purpose of paying bonds issued by them in aid of certain railroads, and whereas, by reason of a defect in the Acts authorizing the issue of said bonds, they have been declared invalid; now, therefore, for the purpose of carrying into effect the expressed will of the people of said townships," enacted etc.

Hence, we submit, that the Act refers, among others, to the bonds now in question.

22 If the date, 22d December, 1888, the date of the Act, be held to be the time when the indebtedness was incurred, then that date is in the fiscal year ending October 31, 1889. We contend that the assessed value to be taken in comparison with the indebtedness, is the assessed value for said fiscal year, irrespective of the time of the year when the assessment was made.

If the preceding assessment, (that for 1887–8), is to be taken, then the issue of bonds is excessive and invalid. But if that for 1888–9 is to be taken, then it is not excessive,
23 because the railroad property of the C. C. & C. R. R., assessed in February, 1889, is to be added. Record, folios, 80, 75, 76.

There were over seven miles in Cane Creek Township, assessed at $5,000 per mile, so that this added to assessment of other property for that fiscal year, (Record, folio 74), $213,066.00 will make over $248,066.00, eight per cent. of which is over $19,000. The Circuit Court based its comparison on the assessment for fiscal year 1887–8, and ex-
24 cluded the railroad property. The Supreme Court of South

Carolina has recently decided that the assessment to be taken is the last assessment preceding the indebtedness.

State vs. Cornwall, 18 S. E. Rep., p. 184.

We submit, that the true construction of the constitution is to apply the assessment for any fiscal year, whenever made to an indebtedness contracted at any time in that fiscal year.

The obvious intention of the constitution is to protect the owners of property from the danger of having to yield up an excessive proportion thereof for public or corporate purposes. Hence it fixes a limit of relation of debt to property, which may not be exceeded. In the absence of any provision to the contrary, the natural and obvious meaning is that the proportion intended, is the proportion existing when the debt is incurred, between the debt and the taxable property then in the county or other political division. 25

Thus if the language were "8 per cent. of the value of the taxable property therein," we think no one would doubt that property existing when the debt was incurred, alone would have to be considered. But in such language there would be wanting a mode or a standard for determining or establishing such value. 26

By the words "assessed value of all taxable property" reference is made to the system of taxation prevailing, and to the assessment of property for taxation, for finding out both what the property consists of, with which the debt is to be compared, and also its value.

But while we are carried to the tax books to find the property and its value, we are carried there, however, to find them as they were on the day when the debt was created. 27

The words "assessed value of all taxable property" exhaust their force and meaning, in fixing the record where is to be found the value of the property to be compared with the amount of the debt. Our proposition is that the taxable property itself with which the debt to be compared is property existing when the debt is incurred. What it is and its value is to be ascertained from the assessment record.

But it may be argued that besides furnishing a standard of value, the force of these words "assessed value" in the 28

constitution is also to indicate that the property to be compared with the debt, is *property in respect to which an actual assessment has been already made.* If so then the property to be compared with the debt may be either property existing at the time the debt is incurred, or property existing at some other time, according to the circumstances of the case.

Thus, if a debt be incurred in that portion of a fiscal year which is subsequent to the time that the actual assessments are made for the year, then it is to be compared with the
29 property of the same fiscal year. If, however, it should be incurred in the portion of the same fiscal year, but prior to the time of the actual assessment of property therein and therefor, then the debt must be compared with the property of some prior fiscal year.

To this construction we would offer two objections:

The first is, as indicated in the illustration just given, that the standard for determining whether or not a debt is illegal, as in excess of the limit, is one that is variable in the same fiscal year, a construction which seems to be unreason-
30 able, and does not arise by any necessary implication from the language from which such an inference is sought.

The second, however, is to our minds more serious still.

In a case where, in the supposed argument, the property of a prior fiscal year is to be taken for comparison with the debt, what prior fiscal year shall we take? The one immediately prior, or the one before that, or the one ten years ago? There is no more authority for taking one than another. One as well as another answers the description, "*property in respect to which an assessment has been already*
31 *made.*"

But save with regard to real estate, the assessment of last fiscal year is as dead for all practical purposes as the assessment of ten years ago.

Where do we find in the constitution that the assessment of the last fiscal year is to be taken?

We presume no one will doubt that if a debt is incurred after the assessments of a fiscal year are made, that the property to be compared with the debt is the property of the same fiscal year of the debt. Hence, then, if our objec-
32 tions are without force, then the constitution would give

this rule: To ascertain whether or not the debt is in excess compare the debt with the property for that fiscal year, if an assessment for that year has actually been made, but if it has not been made, then compare the debt with the property of any prior fiscal year that you please.

Of course it would be perfectly competent for the organic law to provide that the debt shall be compared with the property of a prior fiscal year; and it will be found that in some States this is the case: but when this is the case, it is distinctly stated that the assessment of the prior year and of what prior year shall be taken. 33

As in Chicago vs. City of Manhattan, *et al.*, 25 P. 879, where the language of the statute is, "assessed value of all the taxable property within said city, as shown by the assessment books of the year previous to the one on which the last issue of bonds was made."

In such case there can be no such variable standard as the construction we oppose would offer; there can be no uncertainty as to what year is meant.

There is another view which we do not suppose will be seriously considered, but which we mention merely to give 34 what seems to us all the possible constructions which might occur to any. It is this: The property to be compared with the debt undoubtedly is the property of the same fiscal year as the debt, but it must be property which at the time the debt is incurred is "assessed" property, the assessment in regard to it must be at the time actually and not potentially existing.

By this rule in some fiscal years the standard of legality may vary in three ways in the same fiscal year.

Thus, if it is a year when real estate is to be assessed, no 35 debt incurred at the beginning of the fiscal year could be good, because there would be no property whatever in existence which was then actually assessed.

If it is not such a year, then if the debt was incurred before the assessment of personalty, then the assessed real estate would be the only guide. If incurred afterwards, all the taxable property would be the guide.

But the conclusive answer to our minds is that the constitution requires the comparison to be instituted between the debt and "all taxable property." 36

To be sure, we are to go to the tax books to find out what the taxable property is, and what is its assessed value, but we must go to those assessments which purport to be assessments of "all taxable property," and not of a part thereof.

The only remaining construction that we can think of, is the one for which we contend. The property to be compared with the debt is the property of the fiscal year in which the debt is incurred, and the assessment to which we are to go to find the value of the property, is the assess-
37 ment for that fiscal year, no matter when such assessment may be made. When it is made, all the property of that fiscal year has an "assessed value" and that "assessed value" belongs to that property for that year, and for every day in that year. Its value determinable by reference to the assessment of that fiscal year, is just the same on first November, the first day as it is on the 31st of the next October, the last day.

Let it be established that the property to be compared with the debt is the property in existence when the debt
38 is incurred, and it follows absolutely, that whenever the assessment of that property is made, that assessment furnishes its "assessed value," and the full force of the language of the Constitution is preserved. If the foregoing views are correct, we submit that it follows, inasmuch as the assessment is only to be used as a standard of value, then, if there is an assessment existing at the time when the debt is incurred, upon taxable property then existing, that assessment must be the standard as to all property to which it relates. As to other taxable property then exist-
39 ing, but not covered by an assessment, the assessment as soon as it shall be made, is to furnish the test of value.

To apply the foregoing to the tax laws of this State, we need only consider the general classification of taxable property into real property and personal property.

By the Constitution real property was to be assessed prior to meeting of General Assembly of 1870, and thereafter on every fifth year.

40 Const. of S. C., Art. IX, Sec. 6.

By statute an assessment of real property was required to be made in 1870.

A. A. 28th Feb., 1870—14 Statutes of S. C., p. 377.

Again, by Statute Law, full returns of real property were required for fiscal year 1885—1886.

A. A. 23d Dec., 1884, 18 Statutes of S. C., p. 784.

It does not appear that there has been any subsequent law for assessment of real estate.

So far, then, as real estate owned on 22nd December, 1888, is concerned, the assessed value would be the same as 41
the assessed value of real estate for the fiscal year 1887–1888, with this exception—that new structures have been erected and old ones destroyed, making changes which would not appear until the next returns of personal property were in—at which time all such changes should be noted.

Gen. Stat. of S. C. for 1882, Sec. 228.

The variation in the assessed value of real estate so caused, may be therefore considered in what we have to 42
say in regard to personal property. Now, as to personal property—taxable personal property existing on 22nd December, 1888. This date is in the fiscal year 1888–1889, and to ascertain the assessed value of personal property in December, 1888, we can derive no assistance in the construction of the Constitutional provision in question from the assessment for the prior fiscal year 1887–1888, for two reasons:

1st. The property itself, apart from the fact that its value, from its nature, is continually changing, is itself a 43
variable quantity. It by no means follows that what personalty, and what structures are real estate belonging to one fiscal year, must also be the same in the next fiscal year. The assessment, therefore, on such property for 1887–88 is an assessment on different property than the assessment for 1888–89.

2d. The assessment for 1887–88 had fulfilled all its offices by the end of that fiscal year. It can have no relation whatsoever under our system of taxation to values for the succeeding year 1888–89. 44

It would be strange then if the Constitution in fixing a standard of value for property owned at some period in one fiscal year, and fixing both the kind of property designated and the standard of value, by reference to that system of taxation, should be considered as intending by the terms "assessed value" that such assessment should be applied to the property, as had ceased to be applicable to it for any other purpose whatsoever. It is more reasonable to conclude that the intention rather was to denote that assessment with regard to that property, which for all the pur-
45 poses of taxation is to be held applicable to the property. The terms of the Constitution are general, and are to be construed with regard to the existing system of taxation, which is used in the Constitution as a means of defining the limit of municipal debt. It is true property of the kind we are now considering changes every day in the year, and in that sense there is no method of ascertaining the assessed value of property in a township upon any day.

From the nature of the case an assessment made in any fiscal year when once made must be taken as fixing both
46 the amount of the property and its value for every day in that fiscal year.

If the assessment is made in the spring, the tax theory and practice is that the property remains exactly so in the summer and fall, and that it was so in the previous winter of same fiscal year. Hence taxes are made a lien on property, to be a lien thereon from the very commencement of the fiscal year, though the assessment may not really be made for some time afterwards.

Gen. Stat. of S. C. of 1882, Sec. 170.

47

Before leaving this division we call attention to the fact that railroad property for returns and assessments for taxation, is to be treated as personal property.

Gen. Stat. of S. C. of 1882, Sec. 179.

We conclude then, that except for unchangeable real estate, it is impossible for taxable property existing on 22d December, 1888, could have any assessed value, until the assessment for 1888-89 was made, and that it is impossible
48 that it could have any other assessed value.

If therefore it is contended that the assessment of 1888–89 cannot be considered, it must follow:

1. Either that unchangeable real estate alone is to be considered, in determining the constitutional limit, which would be in violation of the constitutional intent, that *all taxable* property is to be computed, or

2. That the legal amount of a debt incurred in one year, is to be determined by the amount of all taxable property owned in a prior year, which is contrary to the ordinary and natural interpretation of the terms of the Constitution, and in fact necessarily injects the terms property owned in a prior year, which are not to be found in our Constitution, and besides leaves uncertain what prior fiscal year is meant.

II.

But while the bonds may owe their validity to the Act of 22d Dec. 1888, the time when the debt was incurred is not necessarily that time, but the true time was when the bonds should have been delivered out of escrow or when the bonds shall be so delivered.

This Act was certainly intended to validate the bonds in question as well as the bonds of other townships similarly situated; nor does it follow from the fact that the bonds in question owe their validity to the Act of Dec. 22d, 1888, that the debt evidenced by these bonds was necessarily "incurred" at the date of the passage of the validating act. This is indeed admitted by the Circuit Court in the Cherokee Township case, where the Court remarks (Record p. 49) that "this Act distinctly recognizes and imposes on the townships these bonds as a debt of the township to be paid by taxes levied on it and *not a debt to take effect from the passage of the Act, but a debt payable as to its interest from the day the road is completed through the township and is accepted by the Railroad Commissioners.* The bonds issued before the Act was passed are recognized as in existence; the issue of no new bonds is required, and such bonds are declared to be the debt of the township *according to their terms*, that is to say, the bonds, the amount of the debt, the interest payable thereon, the time for the payment of interest, the time for payment of principal and the person to whom payable."

The validating Act applies to "the township bonds *heretofore issued* by the County Commissioners." The expression "bonds heretofore issued" necessarily includes bonds issued or delivered conditionally or in escrow, as well as those issued or delivered absolutely.

The Circuit Court assumed that the debt was incurred at the date of the adoption of the validating Act, namely Dec. 22d, 1888.

In the words of the Court (Record, p. 55). "The debt and the tax owe their authority to this Act of 1888, and
53 the date of this Act must be taken as the time when the debt was incurred, 22d December, 1888."

And the Circuit Court accordingly found that eight per cent. of the assessed value of the taxable property of the township on Dec. 22, 1888, was $18,570.72 or $429.28 less than the amount of the bonds in question.

The important question is, therefore, when was the debt represented by the bonds in question *incurred?*

Clearly the validating Act of Dec. 22, 1888, was not intended to impose a debt upon the defendant township as
54 of that date, irrespective of the terms of the bonds and of the trust agreements under which they had been deposited with the Boston Safe Deposit & Trust Company. The bonds issued, whether conditionally or absolutely, before the Act was passed were thereby recognized as being in existence and were declared to be the debt of the township *according to their terms* and the provisions of the trust agreement under which they had been issued or delivered. In order to test the assumption that the debts of the several townships were necessarily incurred at the date of the
55 passage of the validating Act, the following case may be suggested: Assume that the railroad was not completed through the defendant township and was not accepted by the Railroad Commissioners until after the date of the validating Act. It could not then fairly be contended that a debt was *incurred* by the township at the date of the passage of the Act, for, according to the terms of the trust agreement of November 30, 1887, under which the bonds of the township were deposited with the Boston Safe Deposit & Trust Company, the bonds could not be delivered
56 by the Trust Company or enforced in any manner, nor

would interest be collectible thereon, at least, until the occurrence of these events after the date of the passage of the Act. The Legislature could not, therefore, have intended to impose a debt upon the township or declare that a debt was incurred as of the date of passage of the Act when, according to the terms of the agreement with the township, no debt was to be incurred until a later date.

If the debt in question was not incurred at the date of passage of the validating Act, it must be considered as incurred either (1) at the time when the bonds in question shall be actually delivered to the complainant, or (2) when 57
the complainant was in equity entitled to have the same delivered to it.

The Bonds are not Enforceable and the Debt is not Incurred until Actual Delivery to the Complainant.

The bonds in question have never been delivered to the complainant. They were delivered to the Boston Safe Deposit & Trust Company under the terms of the trust agree- 58
ment (Record p. 35) dated Nov. 30, 1887, between the Board of Commissioners for the County of Lancaster, as the corporate agent of the defendant township, and the Boston Safe Deposit & Trust Company. This agreement provides that the bonds are delivered to the Boston Safe Deposit & Trust Company "upon the following trust, to wit: that whenever the engineer of the Charleston, Cincinnati & Chicago Railroad Company and a majority of the Board of Commissioners of said County attested by the Clerk thereof with the corporate seal of Lancaster County, 59
shall, over their hands, certify to the said Boston Safe Deposit & Trust Company, trustee aforesaid, that the track is laid and the railroad is ready for operation upon each of the following described sections, the trustee shall immediately pay over (meaning 'deliver,' as shown by the subsequent provisions of the agreement) to the Massachusetts & Southern Construction Company the several amounts of the said seven per cent. coupon bonds of the townships aforenamed, as hereinafter set forth and in the order hereinafter set forth." 60

The agreement further provides, that "before the said trustee shall deliver the said bonds as aforesaid, the coupons that have matured upon the same shall be detached and surrendered to the said Board of Commissioners for cancellation, and the said bonds shall not draw interest except from the date of the certificates signed by the said engineer of the Charleston, Cintinnati & Chicago Railroad Company and a majority of the Board of Commissioners of the County of Lancaster."

It appears from the agreed facts (Record, pp. 41 and 42)
61 that the Chief Engineer of the Charleston, Cincinnati & Chicago Railroad Company, on August 20, 1888, first made the certificate required by the trust agreement of November 30, 1887, as one of the conditions precedent to the delivery of the bonds, and that on January 12, 1889, a demand was made upon the Board of Commissioners of Lancaster County that they should sign the certificate, also, required to be made as a condition precedent to the delivery of the bonds, but that the Board of Commissioners of Lancaster County, on January 12, 1889, refused to sign such
62 certificate.

It appears, further, that the Board of Commissioners of Lancaster County have never signed such certificate.

The complainant seeks, by this suit, on equitable grounds, to have delivery of the bonds in question made to it, in the absence of such certificate from the Board of Commissioners of Lancaster County.

It must be conceded that under the terms of the trust agreement of November 30, 1887, these bonds were delivered to the Boston Safe Deposit & Trust Company, not ab-
63 solutely, but conditionally and in escrow, and that no absolute delivery of the bonds has ever been made. It seems clear that the Trust Company could not sue the defendant township upon these bonds, and that they are, up to this date, not enforceable against the defendant township, and cannot be enforced until they have been delivered by the Trust Company to the complainant. Indeed, the Circuit Court admitted that the bonds were merely delivered conditionally to the Trust Company, for the Court says, (Record, p. 54), "The bonds were executed and deposited with
64 the Boston Safe Deposit & Trust Company *as escrow* 14th January, 1888."

That bonds, notes and other obligations, may be delivered conditionally, in escrow, in the same manner and with the same effect as deeds, see

Hinchman vs. Lincoln, 124 U. S., 38.
Wilson vs. Union Savings Ass'n, 52 Fed. Rep., 421.
Fay vs. Blackstone, 31 Ill., 538.
Henshaw vs. Dalton, 59 Mo., 139.
Andrews vs. Thayer, 30 Wis., 328.
Taylor vs. Thomas, 13 Kan., 217.

The well-settled rule as to deeds is that delivery is necessary, in order that they may be valid and effective, that delivery may be conditional as well as absolute, and that when a delivery is made to a third person to hold as escrow, the deed does not take effect until a second delivery by such third person to the grantee, and becomes a valid deed as of the date of such second delivery. 65

Wheelwright vs. Wheelwright, 2 Mass., 447.
Fairbanks vs. Metcalf, 8 Mass., 230
Daggett vs. Daggett, 143 Mass., 516.
Shepherd's Touchstone, pp. 58 and 59. 66
Cook vs. Brown, 34 N. H., 460.
Bishop of Bath's Case, 3 Coke, 326.
Bucknal's Case, 5 Coke, 35.
Barnes' App't, 113 Pa. Lt., 58.
Watkins vs. Nash, L. R., 20 Eq. 262.
Prutsman vs. Baker, 30 Wis., 644.
Frost vs. Beekman, 1 John's Ch., 288.
Green vs. Putnam, 1 Barb., 500.
Hathway vs. Payne, 34 N. Y., 92, 105.
Witcher vs. Whalen, 1 Wend., 179 n. 67
Clark vs. Gifford, 10 Wend., 310, n.
Stanton vs. Miller, 65 Barb., 58.
Ruggles vs. Lawson, 13 Johns., 285.
Black vs. Shreve, 13 N. J. Eq., 455.
Hall vs. Harris, 5 Iredell Eq., 303.
Downing vs. Holscher, 49 Mo., 86.
Furness vs. Williams, 11 Ill., 229.
Price vs. R. R. Co., 34 Ill., 13.
Harkreader vs. Clayton, 56 Miss., 383.
Taft vs. Taft, 59 Mich., 185. 68

See also:

52 Miss., 723; 48 Miss., 710; 2 Jac. & W., 87; 1 Dyer, 34 b.; 4 Kent. Commis. (13 ed.), 454; Bishop Conts., § 359; 5 B. & C., 671; 1 Dev. Deeds, § 328.

No valid reason can be shown why the above principles relating to deeds should not be equally applicable to bonds held in escrow. In many cases when a deed held in escrow has been finally delivered to the grantee, the courts, for va-
69 rious equitable reasons, have resorted to a fiction of law and adopted the doctrine of relation, and have held that the second delivery to the grantee, by the person holding in escrow, should relate back to the time of the original delivery by the grantor in escrow, in order that the substantial ends of justice might be realized. But it is urged, that the doctrine of relation, in such cases, has always been regarded as an exception to the general rule above stated, and is strictly confined to a limited class of cases, as, for example, where the grantor becomes insane, or dies before
70 the second delivery;

Brook's Reading, p. 150. 3 Co., 35 b., 36 a, 5 Co,, 85. Ruggles's Lawson, 13 Johns., 285.

Or, where the grantee dies;

Bodwell vs. Webster, 13 Mass., 414.

Or, where the rights of creditors have intervened prior to the second delivery to the grantee.

71 Morse vs. Slason, 13 V't, 206, 307.
Shirley vs. Ayres, 14 Oh., 307.

It is further suggested that the doctrine of relation has been applied only in cases where the grantee has requested its application and where circumstances have arisen between the date of the delivery in escrow and the final delivery which would render it just and equitable that the doctrine should be so applied. In this case no such circumstances or events have intervened between the original delivery in
72 escrow and the present time. The bonds are to-day in the

possession of the Trust Company, in escrow, under precisely the same conditions as when they were originally deposited with the Trust Company in 1888. The complainant, by this suit, seeks to have the same delivered to it, and claims no accrued interest on the bonds until after delivery to it in pursuance of a decree in this suit, and maintains that under the terms of the trust agreement the trustee should detach and surrender to the Board of Commissioners of Lancaster County for cancellation all coupons that have matured upon the bonds up to the time of a final decree in this suit. According, no enforceable obligation against the 73
township exists at the present time or can exist until actual delivery of the bonds to the complainant herein. Upon such delivery, the bonds and the coupons thereafter maturing become enforceable for the first time against the defendant township, and upon such delivery, a bonded debt is "incurred" by the defendant township as of the date of such delivery. It appears from the agreed facts and is conceded that, if the debt is considered as incurred on October 31, 1889, or at any subsequent date, eight per cent. of the assessed value of all the taxable property in the defendant 74
township was amply sufficient to equal the bonded debt of $19,000 in issue in this suit.

The bonds were not enforceable and the debt was not incurred until the complainant was in equity entitled to have the same delivered to it.

Assuming that it was not necessary that there should be actual delivery of the bonds by the Trust Company to the complainant in order to render the bonds enforceable and 75
thereby create a debt, the bonds did not become enforceable at least until the complainant was entitled in equity to have the same delivered to it. The trust agreement of Nov. 30th, 1887, required certificates by the engineer of the Railroad Company and by the Board of Commissioners of Lancaster County as conditions precedent to the delivery of the books by the Trust Company holding the same in escrow. If the bonds owe their validity solely to the Act of December 22d, 1888, any certificates or demands for certificates made prior to that date are immaterial and of no 76

effect. The complainant, in the absence of a certificate from the Board of Commissioners of Lancaster County, was not in equity entitled to have the bonds delivered to it at least until a demand for such certificate upon the Board of Commissioners of Lancaster County and a refusal by them to grant such certificate. The demand upon said Board of Commissioners and refusal by them to grant their certificate occurred on Jan. 12. 1889. The complainant then, for the first time, became entitled to have the bonds delivered to it. Prior to that date the bonds were not
77 enforceable as a debt against the defendant township, and not until that date was a debt "incurred" by it. If the debt was incurred at that date, namely, Jan. 12, 1889, the material question to be determined is, what was the "assessed value of all the taxable property" in the defendant township at that date?

In order that eight per cent. of the assessed value of the taxable property of the defendant township may equal the face value of the bonds in suit, namely, $19,000, it is necessary that the total assessed value of such property should
78 at least equal $237,500. The Circuit Court found that the assessed value for the fiscal year ending October 31st, 1888, was $232,134: but the Circuit Court excluded all consideration of the value of the property of the Charleston, Cincinnati & Chicago Railroad, situated in the defendant township, the very property in consideration of the completion of which, the bonds in suit were issued. The Circuit Court, in its decision, says that "the property of the last-named railroad—(the Charleston, Cincinnati & Chicago Railroad), was not assessed for taxation until 19th February,
79 1889, after the passage of the Act of 1888. It cannot be included in the basis upon which the per centage is estimated in order to ascertain if this subscription is within the constitutional limit." (Record, p. 55).

If the value of the property of the Charleston, Cincinnati & Chicago Railroad Company, situated in the defendant township should be included in the "assessed value of all the taxable property" in the defendant township, as of the date of January 12th, 1889, it is apparent from the agreed facts, and is substantially conceded, that the total value of
80 all the taxable property in the defendant township as of

that date would more than equal $237,500, and that the bonds in suit would be within the constitutional limit. It appears (Record, p. 46), that "on the 18th day of February, 1889, this railroad—(the Charleston, Cincinnati & Chicago Railroad), was first returned and assessed for taxation at the rate of $5,000 per mile," and that, for the purposes of this case, (Record, p. 47), "of the Charleston, Cincinnati & Chicago Railroad seven miles and 4,601 feet lie in Cane Creek." It appears, further (Record, pp. 46 and 47), that this assessment of February 18, 1889, "was for the fiscal year beginning October 31, 1888. Returns of all property are made 81
in the months of January and February of each year, and *such property only as the taxpayer owns on the first day of January*, of that year, is assessed for taxation."

So that, although the actual assessment for taxation was not made in 1889 until February, 18th, the assessment for that and every other year is made as of the first day of January, and relates back to that time. The date of actual assessment is not important. Only such property as the taxpayer owns on the first day of January is assessed for taxation, and it is the duty of the assessors to put such 82
value on the property assessed as it had on the first day of January. The "assessed value" of the taxable property is, necessarily fixed as of the first day of January. The "assessed value of all the taxable property" in the defendant township on January 1st, 1889, was, accordingly, in excess of $237,500. The complainant was not entitled to the delivery of the bonds in suit until January 12th, 1889, and the debt represented by the bonds, was not "incurred" until that date. The bonds were, accordingly, at that date, within the constitutional limit and valid. 83

SAMUEL LORD,
For Appellants.

EXTRACTS FROM STATUTES AND CONSTITUTION OF SOUTH CAROLINA REFERRED TO IN ARGUMENT.

At folio 40,

Constitution South Carolina, Article 14, Section 6:

"The General Assembly shall provide for the valuation and assessment of all lands and the improvements thereon prior to the assembling of the General Assembly of one thousand eight hundred and seventy, and thereafter on every fifth year." 84

A. A. 28th February, 1870, 14 Statutes of S. C., page 377:

"Be it enacted, &c., That an assessment of the real property in this State shall be made in the year one thousand eight hundred and seventy, at the same time that the assessment of personal property is made, and in the same manner, and according to the rules prescribed for the assessment of real property in the Act to provide for the assessment and taxation of property, passed the 15th day of September, 1868." 85

A. A. 23d December, 1884, 18 Statutes of S. C., page 784:

"In conformity with the provisions of Section 1 there shall be no returns of property for taxation during the year 1885; but in lieu thereof, property will be listed for the taxes of the fiscal year 1885–86, from January 1st to February 20th, 1886, as above provided."

At folio 41,

Gen. Stat. of S. C., for 1882, Sec. 228: 86

"Each Auditor shall, annually, at the time of taking the list of personal property, also take a list of all real property in the County, subject to taxation, which shall not have been previously listed; and of all new structures not previously listed, and of all old structures which were destroyed during the previous year, and affix a value thereto, with a description of the land or lot on which the same is or was situate, endorse his affidavit thereon that the same is correct, that the valuation therein stated have been made ac- 87

cording to the rules prescribed by this Chapter, and return the same, with the names of the owners, respectively."

At folio 46,

Gen. Stat. of S. C., of 1882, Sec. 170:

"All taxes, assessments and penalties, legally assessed, shall be considered and held as a debt payable to the State by a party against whom the same shall be charged; and such taxes, assessments and penalties shall be a first lien in all cases whatsoever upon the property taxed; the lien to
88 attach at the beginning of the fiscal year during which the tax is levied."

At folio 47,

Gen. Stat. of S. C. of 1882, Sec. 179:

"The road bed, right of way, station buildings, toll houses, structures, tools, machinery, poles, wires, fixtures, vessels and real estate, owned and necessarily in daily use by any railroad, turnpike, plank road, bridge, telegraph, canal, or slack-water navigation company, in the prosecu-
89 tion of its business, shall, for the purposes of this Chapter, if the company be organized in this State, be treated as personal property."

155 283

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Brief for Respondent.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.—No. 112.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY, APPELLANT.

vs.

THE TOWNSHIP OF CANE CREEK, LANCASTER COUNTY, SOUTH CAROLINA, AND THE BOSTON SAFE DEPOSIT AND TRUST COMPANY.

ENTERPRISE PUBLISHING COMPANY,
LANCASTER, S. C.

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2

Brief of Attorney for Cane Creek Township, Respondent.

STATEMENT.

3

On the 26th day of June, 1886, Cane Creek Township, in Lancaster County, South Carolina, voted a subscription of $19,000 payable in coupon bonds to the Charleston, Cincinnati & Chicago Railroad Company (Record, folio 50). Pursuant to an Act of the Legislature of South Carolina, chartering the Georgetown and North Carolina Railroad Company, approved March 4th, 1878, and an amendatory Act, approved December 21st, 1883, authorizing counties and townships to subscribe to its capital stock such sums as a

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majority of the voters voting may authorize the County Commissioners to subscribe, and amendatory Act, approved Dec. 22nd, 1885, changing the name of said Railroad Company to the Charleston, Cincinnati & Chicago Railroad Company and conferring upon the last named company the rights, powers, privileges and franchises conferred upon the former. Folio 49.

On the 17th day of March, 1887, the County Commissioners of Lancaster County, as the corporate agents of Cane
5 Creek Township, entered this subscription on the books of the Railroad Company, folio 51.

On the 30th day of July, 1887, the Charleston, Cincinnati & Chicago Railroad Company in writing assigned to the Massachusetts and Southern Construction Company all its interest in the said subscription and bonds, folio 54. On the 30th day of November, 1887, the County Commission-
6 ers of Lancaster County as corporate agents for Cane Creek Township signed and sealed with the corporate seal of Lancaster County, bonds of said Township to the amount of $19,000, and delivered said bonds to the Boston Safe Deposit and Trust Company under a deed of trust of same date, folio 54, containing the following stipulation:

That whenever the engineer of the Charleston, Cincinnati & Chicago Railroad Company and a majority of the
7 board of Commissioners of said County, attested by the Clerk thereof, with the corporate seal of Lancaster County shall, over their hands, certify to the said Boston Safe Deposit and Trust Company, trustee aforesaid, that the track is laid and the railroad is ready for operation upon each of the following described sections, the trustee shall immediately pay over to the Massachusetts and Southern Construction Company the several amounts of the said seven per cent. coupon bonds of the Township aforesaid, as hereinafter set
8 forth and in the order hereinafter set sorth, &c., folio 56.

It is also provided in said agreement that "before the said trustee shall deliver the said bonds as aforesaid the coupons that have matured upon the same shall be detached and surrendered to the said board of Commissioners for cancellation, and the said bonds shall not draw interest except from the date of the certificates signed by the said engineer of the Charleston, Cincinnati & Chicago Railroad Company and a majority of the board of Commissioners of the County of Lancaster," folio 56. The railroad was completed through the Township on the 20th day of August, 1888. 9
Certificates of the completion of the railroad through the Township was made by the Chief engineer on the 20th day of August, 1888, and on same day demand was made on the County Commissioners of Lancaster County for certificate to the same effect, folio 61. The County Commissioners refused to make the certificate. On the 30th day of November, 1888, the Supreme Court of South Carolina in the case of Whitesides vs. Neely, following Floyd vs. Perrin 10
(30 S. C. 1st Sec.) held that the Act under which the foregoing proceedings were had was unconstitutional, and that the votes, subscriptions, agreements and bonds attempted thereunder were absolute nullities. Then the Legislature of South Carolina on the 22nd day of December, 1888, passed the "Act to provide for the payment of Township bonds issued in aid of railroads in this State." This Act declares all bonds heretofore issued by Townships to be 11
debts which authorized the issuance thereof, and provides that the interest and principal thereof shall be paid by taxation upon said Townships. After the passage of this Act, on the 12th day of January, 1889, demand was again made on the County Commissioners for the certificate, folio 61, and the County Commissioners refusing to so certify, on the ground that they had no power to issue such bonds, on the 16th day of January, 1889, the Charleston, Cincinnati & Chicago Railroad Company, the Massachusetts and South- 12

ern Construction Company and the Boston Safe Deposit and Trust Company all joined as relators in an application to the Supreme Court of South Carolina for a writ of mandamus to compel the County Commissioners of Lancaster County to sign the said certificate, and thereby deliver said bonds. The Supreme Court refused to grant the mandamus, holding that the Couuty Commissioners had no duty to perform in the premises, the Act under which the subscription was made being void. See State *ex rel* vs. Whitesides,
13 State *ex rel* vs. Neely and State *ex rel* vs. Harper, 30 S. C. 579 1st. Sec., decided 16th April, 1889.

In these cases, however, the Supreme Court held the Act of 1888, supra, to be constitutional and valid as an Act not to validating said bonds, but to impose a debt upon the Townships to be represented by said bonds and to be paid by taxation upon the Townships.

14 The County Commissioners still refusing to authorize the delivery of said bonds and forbidding the Boston Safe Deposit and Trust Company to deliver them, this action was commenced in the Circuit Court in November, 1889, alleging substantially the foregoing facts to compel the Defendant Township to specifically perform its agreement by assenting to the delivery of said bonds in the hands of said Defendant Trust Company, and that said Defendant Trust Company be ordered to pay over and deliver said bonds to
15 the Complainant, folio 11.

The Complainant is a corporation and citizen of the State of Massachusetts, folio 1, claiming these bonds or the debt represented by them, as assignee of the Charleston, Cincinnati & Chicago Railroad Company, which is a citizen of the State of South Carolina. The Defendant, the Boston Safe Deposit and Trust Company, is a citizen of Massachusetts, the same State of which Complainant is a citizen.

16 At the same time this case was commenced the Com-

plainant filed seven other bills, against five several Townships in York County, viz: Cherokee, Broad River, Yorkville, Ebenezer and Catawba, and two other townships in Lancaster County, viz: Gills Creek and Pleasant Hill in each of which cases the said Trust Company was made a party defendant. This cause was heard with the seven other cases, involving substantially the same questions and facts, except that in this case the further question was made that the said $19,000 of bonds involved here exceeded eight per cent. of the assessed value of the taxable property of the townships, folios 66, 67. 17

Objection was raised on Circuit by Defendant Townships to the jurisdiction of the Court on two grounds, first, because the Boston Safe Deposit and Trust Company is a defendant and is a citizen of the same State with Complainant, and is not a mere formal party; second, because the Complainant was sueing in the Circuit Court for South Carolina as assignee of a corporation of South Carolina. The 18
Circuit Court held that it had jurisdiction, and in seven of the said cases gave judgment that the said Trust Company should deliver the bonds with interest adjusted to run from the time of the completion of the railroad in the townships. In this case the Court reserved its decision and ordered further testimony to be taken on the issue raised that the bonded debt exceeded eight per cent. of the assessed value of the taxable property of the Townships at the time of the 19
approval of the Act imposing this debt on the Township, viz: Dec. 22nd, 1888.

From the agreed statement of facts, Record page 52, folios 74 and 75, it appears that the last official assessment of property in Cane Creek Township, previous to December 22nd, 1888, shows the taxable property to be $232,134. The bonded debt being $19,000 is in excess of the Constitutional limit. The Circuit Court so held, and dismissed the 20

bill on this ground. Complainant appeals and assigns as error (we will assume): That the Court erred in taking the assessed value of the taxable property of the Township for the fiscal year ending October 31st, 1888, whereas it should have taken as the test, the assessed value of the taxable property of the Township for the fiscal year ending October 31st, 1889, inasmuch as the Act of December 22nd, 1888, imposing the debt, was passed during the latter fiscal year. It is conceded that if the assessment made in 1889
21 is the test, then the issue of bonds did not exceed the Constitutional limit, the assemment being $268,890.

I.

As we understrnd it, the only question presented by this appeal is:

"Did the Circuit Court err in not including in its estimate of the assessed value of the township property the property of
22 the Charleston, Cincinnati & Chicago Railroad Company because the return and assessment of said property, though made in January, 1889, related back when made to the beginning of the fiscal year, to wit, the 1st. of November, 1888?" See Record, page 56, folio 81 for appellant's assignment of error, and see Record, page 58, folio 87 for agreement of counsel as to the limitations of the argument before this Court.

23 We think therefore that the second division of appellant's argument is not authorized. He argues under this division that the township debt was not incurred Dec. 22nd, 1888, but was or is to be deemed incurred when the bonds should have been delivered out of escrow, or shall be so delivered. Whereas the Circuit Court, Record, page 55, folio 79, expressly held that "the debt and tax owe their authority to this Act of 1888, and *the date of this Act, must be taken as the time when the debt was incurred, 22nd. Decem-*
24 *ber, 1888.*"

This ruling is not challenged by any assignment of error. The bill alleges in paragraph 11, see Record, page 7, folio 9, that Complainant" was entitled to receive said bonds on and after the 20th day of August, 1888, when the balance of said railroad through said township, was accepted by the said railroad commission and said certificate of the said engineer, showing the completion of the said railroad, was presented to said board of County Commissioners for certification according to the terms of said trust indenture, and the refusal of the said board to certify as aforesaid, and that it has ever since been entitled to have said bonds paid over to it by said defendant trust company."

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The railroad was completed through the township August 20th, 1888. The Chief engineer so certified, and demand was made on the County Commissioners for their certificate on the 20th August, 1888. Record, page 42, folio 61. The Circuit Court in the seven other township cases, heard with this, ordered the township bonds to be delivered to Complainant, with interest to run from the completion of the railroad within the townships respectively. See Record, page 49, folio 70, where the Circuit Court in the Cherokee case held the debt to be "a debt payable as to its interest from the day the road is completed through the township and is accepted by the railroad commissioners" and in folio 11 where the Court held that "the bonds are to be delivered to complainant when the road has been completed through the township and when the agent of the defendant certifies to that fact on the engineer's certificate. The latter is in the record. The defendant's agent refuses to endorse it. The fact remains, however, that the road has been completed through the township. The certificate providing for the delivery of the bonds was for mutual convenience of the parties. The Court cannot permit that which was intended for mutual convenience to be used by one of the parties as an unreasonable obstruction. The Act of the

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Chairman in indorsing the certificate would be an act binding his principal as to the fact of the completion of the road. For this purpose only would it be desirable. The principal being in Court the decree can bind it as effectually to the admission of this fact as his certificate would."

Under these circumstances we were not expecting Complainant to take the position that, *the bonds are not enforceable and the debt is not incurred until actual delivery to the Complainant.*

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Our reply to this is :

1. If actual delivery to Complainant is essential to the debt, then the Act of 1888, supra, does not apply to Cane Creek Township at all, and Complainant has no right to any relief against the defendant under that Act. Cane Creek Township is not named in the Act, The Act in its title refers to bonds, "issued by township" and in its body to bonds "*heretofore issued* by any township." These bonds

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have never been *issued*, if actual delivery is essential to make them enforceable. Therefore these bonds have never been imposed upon Cane Creek Township as a debt by any valid act of the Legislature of South Carolina.

2. If actual delivery is essential then the Circuit Court was without jurisdiction in this case. The Bill and Circuit Court decree are based on the theory that actual delivery is not essential. Jurisdiction was maintained under Desh-

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ler vs. Dodge, 16 How. 622, on the ground that this is a suit for the possession of property in specie.

The principle of Deshler vs. Dodge could not be applied to papers or bonds which are incomplete by reason of the fact that they have not been delivered or issued. Bonds incomplete by reason of non delivery are not negotiable corporate bonds and excepted from the provisions of Sec. 629, Revised Statutes U. S. as amended March 3rd, 1887,

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denying jurisdiction to the Circuit Court in a suit by an as-

signee where the assignor could not sue.

3. If actual delivery is essential, then the Boston Safe Deposit and Trust Company, a citizen of the same State with Complainant, the custodian of the bonds and the only person capable of making delivery, is an indispensable party to this suit and not a mere formal party.

We argued on Circuit against the jurisdiction of the Court very much on the same line that Complainant now argues to overturn its decree.

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4. If actual delivery of these bonds is essential to determine the time when the bonded debt is incurred, then, since no delivery has been made, it would be absolutely impossible in this case to offer evidence as to the amount of the assessed value of the taxable property of the township at the time of the incurring of the debt, a thing of the future, and thus defendant would be denied the right in these proceedings to defend on the ground that the bonds exceed the constitutional limit. It must follow, under appellant's contention, that there should be a decree for the delivery of the bonds in this case and an actual delivery, before relevant testimony could be offered as to assessed value of the township property. Who can know what will be the assessed value of the township property when these bonds shall have been delivered?

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Again appellant contends that, *The bonds were not enforceable and the debt was not incurred until the Complainant was in equity entitled to have the same delivered to it.*

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He then proceeds to show that demand for the certificate was made on the 12th day of January, 1889, and that this was the time when Complainant first became entitled to have the bonds delivered to it.

It will be remembered that demand was first made on the 20th August, 1888, folio 61.

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As is seems to us, it is altogether unimportant whether the time for determining if the debt exceeded the constitutional limit was Dec. 22nd, 1888, the date of the passage of the Act imposing the debt, or the 12th day of January, 1889, the date of the demand for the bonds after the passage of the Act of 1888. The railroad property which the Circuit Court excluded in its estimate was for the first time returned for taxation on the 18th day of February, 1889. See Record, folio 66.

37 Appellant contends that the assessment of 1889, which relates to the fiscal year commencing November 1st, 1888, is the test of the question whether the amount of the bonds is in excess of the limit fixed by the Constitution. If this be true, it is indifferent whether the debt was incurred December 22nd, 1888 or January 12th, 1889.

II.

38 *The last official assessment as shown by the record in the Auditor's office at the time the debt was incurred is the test.*

The clause of the Constitution of South Carolina which relates to this question is as follows:

Art. IX. Sec. 17. "Any bonded debt hereafter incurred by any county, municipality, corporation or political division of this State, shall never exceed eight per cent. of the assessed value of all the taxable property therein."

39 What is the meaning of the words "assessed value of all the taxable property therein"?

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In Lake County vs. Rollins, 130 U. S. 670, this Court laid down the following rule of construction:

"To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort in all cases is to the natural signification of the words in the order of grammatical arrangement in which the framers of the in-
40 strument have placed them. If the words convey a defi-

nite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning apparent on the face of the instrument must be accepted and neither the Courts nor the Legislature have the right to add to it or take from it" (citing a number authorities). "So also where a law is expressed in plain and unambiguous term, whether these terms are general or limited the Legislature should be intended to mean what they have plainly expressed and consequently no room is left for construction 2 Cranch 359, 99 U. S. 72. There is even stronger 41
reason for adhering to this rule in the case of a Constitution than in that of a Statute. * * * The simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption."

The simplest and most obvious interpretation of the expression "*assessed* value" in the clause under consideration would be a "value already placed upon property for taxation by competent authority." This clause of the constitution was considered by the Supreme Court of South Carolina in the case of State vs. Tolly, 16 S. E, Rep. 42

The city of Anderson on the 7th of March, 1892, under an Act of the Legislature proposed to issue $111,000 in bonds, $36,000 of which were to retire bonds previously issued in aid of the Savannah Valley Railroad and $75,000 43
were to be subscribed to the South Carolina Industrial and Winthrop Normal School. The Taxable property of the city, as assessed for taxation pursuant to law in January 1892 was $1,305,885, eight per cent of which would be less than the amount of bonds proposed to be issued. The Supreme Court held that such issue of bonds would be in violation of Sec. 17, Art. 9 of the Constitution. The Court further held that other property, though situated in the city and though taxable could not by resolution of the 44

Town Council be added to the original made pursuant to law for the purpose of making the assessment sufficient to avoid the constitutional difficulty. Chief Justice McIver, delivering the opinion said on the point:

"We find that the language used in the constitutional provision is not eight per centum of the actual or real or market value of the taxable property, but the language is of the *assessed* value of all the taxable property therein." This word assessed has, and had at the time of the adoption
45 of the constitutional provision now under consideration, a well defined meaning when applied to taxable property, and the framers of that provision must be assumed to have used it in the same sense in which it was used in the various Acts of the Legislature relating to the subject of taxation. It must be regarded as meaning *the value placed upon the property for the purpose of taxation by officials appointed for that purpose.*"

46 The test of the above case was the *last preceding completed official assessment of city property..*

This identical question was decided in November, 1893, by the Supreme Court of South Carolina in the case of State vs. Cornwell 18 S. E. Rep. 184.

This was an application for a mandamus to compel the corporate agents of Broad River Township to levy a tax to
47 pay past due coupons on bonds of the township held by relator. Defence was made that the bonds were void because the issue was in excess of the limit prescribed in the Constitution. The assessed value of all the taxable property in the township as ascertained by the next preceding assessment which had been made in the early part of the year 1888, for the fiscal year of 1887–88, before the Act purporting to create the debt was passed, amounted to $271,-350, while the assessed value of all such property as as-
48 certained by an assessment made in February, 1889, for the

fiscal year 1888–89, after the passage of said Act, amounted to $314,400. The issue of bonds was $24,000. The application for mandamus was refused, the Court holding that the clause of the Constitution in question means "the assessed value as ascertained by the next preceding assessment appearing on the tax books of the County and cannot mean any assessment to be made subsequent to the time when the debt in question purports to be contracted."

The very contention made by appellant in this case was 49
made in the last case cited, and we cannot do better than quote some of the language of the Court giving the reasons for the view adopted by the Court, which we think unanswerable.

Quoting. "In the first place, it seems to us that there is an insuperable practicable obstacle in the way of adopting the assessment made after the debt purports to have been contracted as contended for by the counsel for petitioner in 50
this case; for, if so, it would be impossible for persons desiring to purchase bonds, as well as for the taxpayers of the township, to know whether the bonds were valid or not, as they would have no means of ascertaining what would be the assessed value of all the taxable property in the township until after the next assessment should be made and finally completed, and it might be, and probably would be, months before one of the essential facts necessary to the 51
determination of the question of the validity of the bonds could possibly be ascertained. Again, the construction contended for by the relator would open the door to fraud and oppression, for a majority desirous of fixing a burdensome debt upon the township might exert the power which majorities always possess to increase unduly the assessments for the fiscal year, in order to bring the amount of the debt proposed to be contracted within the constitutional limit, relying upon the same power to reduce subsequent 52

assessments, and thus practically defeat the wise purpose of the constitutional provision. After quoting from State vs. Tolly, supra, the Court said: "In all this, reference is had to the past and not to the future,—to an assessment already made and completed, and entered upon the proper record. The word "assessed" in the constitutional provision, being in the past tense, implies the same thing. But what seems to be absolutely conclusive is this: It must be assumed that the Legislature, or any subordinate agency of the gov-
53 ernment invested with power to contract a debt, would be careful, in exercising such power, not to go beyond the limits prescribed by the constitution; and if the body, when contracting, has no means of ascertaining whether the amount is within the prescribed limit, which could not be done until another assessment has been made, it is very obvious that such care could not be exercised in issuing the bonds or contracting the debt before such new assessment
54 is made."

Under the tax laws of South Carolina all personal property must be returned for taxation between the 1st day of January and the 20th day of February of each year. The taxpayer returns only such property as he owned on the 1st day of January and at value belonging to it at that date. Railroad property is returned every year and is claimed as personal property. Real estate is assessed every
55 fifth year. The assessment to realty previous to Dec. 22nd, 1888, was made in 1886 and was of force until 1890. New structures placed upon realty are to be returned for taxation every year when returns of personalty are made. The various townships, County and State boards all have to pass on assessments before the official record is made up. As to railroad property in 1888 and 1889 the State Board of Equalization assessed railroad property in September of each year and the assessment is certified by the Comp-
56 troller General to the County Auditor, Gen. Stat. S. C.

Sec. 186 and 187. Various provisions are made allowing Auditor to add to the tax list in case of neglect or default of taxpayer to return his property, Sec. 216, 238 and 245. The tax lists are to be completed and delivered to the County Treasurer on his authority to collect taxes, and complete abstracts must be forwarded to the Comptroller General by 30th September of each year, Sec. 234. Various provisions are made for making "additional entries" even while taxes are being collected, and for abatements in assessments. It will therefore be seen that the official as- 57
sessment for the year 1889 was not and could not be made up until about 30th September.

If therefore the contention of appellant is correct municipal officers dare not issue bonds in any month of the year except October for fear of exceeding the constitutional limit, since the fiscal year begins Nov. 1st, and the official assessment is not, or may not be, complete until 30th Sept.

Suppose bonds are issued on the 1st day of November 58
and according to the record in the Auditor's office the preceding fiscal year, are not in excess of the constitutional limit, and a purchaser in good faith has appealed to the record fixed by the constitution and relying on it, invests his money in the bonds! Will the bonds be declared void because sometime during the fiscal year beginning November 1st the completed assessment of that fiscal year shows that the amount of the bonds exceed the prescribed limit? 59
On the other hand, can bonds, void by the official record when issued, be made good by subsequent record? Is it not manifest that when the constitution refers purchasers of bonds to the tax books to ascertain if the constitutional limit has been exceeded that it means a completed tax list in existence showing "assessed value" at the time of the issuance of the bonds?

We have seen that the taxpayer returns for assessment 60

what he owns on the 1st day of January of each year. The railroad property excluded by the Circuit Court from its estimate was not returned until 18th Feb., 1889 and was not *assessable* on the 22nd Dec., 1888, but became first liable to assessment on the 1st day of January, 1889. How could this property have an "assessed value" on the 22nd. Dec., 1888, before it became *assessable?*

Appellant's argument that "An assessment made in any
61 fiscal year, when once made, must be taken as fixing both the amount of the property and its value for every day in that fiscal year" we think is unsound as applied to the question at hand, since property assessed for the first time on the 18th day of February could not in the nature of things have an "assessed value" on the 1st day of November previous. Such an assessment may, for certain fiscal purposes, relate to a fiscal year beginning before the assessment, but that does not alter the fact that an "assessed
62 value" could not precede the actual assessment.

We think it is a mistake to suppose that an assessment relates only to the fiscal year in which it is made. The assessment is made in the beginning of the calendar year and is valid and effective throughout the calendar year. So that an assessment made in January of 1888 is operative until January, 1889, when the new assessment is made.

The assessment must precede the tax. Art. 2, Sec. 33
63 of the South Carolina Constitution provides that "All taxes upon property, real and personal, shall be laid upon the actual value of the property taxed as the same shall be ascertained by an assessment *made for the purpose of laying such tax.*"

The construction given by the Supreme Court of a State to its own Constitution and laws is generally followed by the United States Courts.

64 9 Cranch, 87.

7 Wall, 813.
16 Wall, 678.
17 Wall, 648.
3 Dall, 314.
10 Wheat, 152.
6 Pet., 291.
16 Pet., 18.
2 Black, 599.
94 U. S., 261.
92 U. S., 294, 575. 65
100 U. S., 52.

Complainant cannot invoke in its behalf any one of the exceptions to this well settled rule. There is no Federal question here. There is no question under the law merchant for solution according to principles common to all the States. The rights of *bona fide* holders of bonds put on the market as commercial paper are not involved here. No rights have been acquired under the strength of former 66 decisions of the State Court sustaining the validity of the bonds.

In Township of Elmwood vs. Marcy, 92 U. S., 294, this Court declared as follows:

"We are not called upon to vindicate the decision of the Supreme Court of Illinois in these cases or approve the reasoning by which it reached its conclusions. If the question before us had never been passed upon by it, some of 67 my brethren who agree to this opinion might take a different view. But are not these decisions binding on us in the present controversy? They adjudge that the bonds are void because the laws which authorized their issue were in violation of a peculiar provision of the constitution of Illinois. We have always followed the highest Court of the State in its construction of its own constitution and laws. It is only where they have been construed differently at 68

times that in a case like this we have adopted as a rule of action the first decisions and rejected the last. This has been done on the ground that rights acquired on the strength of the former decisions ought not to be lost by a change of opinion in the Court."

It may be true that where bonds have been issued before any decision adverse to their validity has been made by the State Court the Federal Court will ascertain for itself whether the bonds are valid under the Constitution and
69 laws of the State. Footh vs. Johnson City, 5 Dillon, 281. This applies to bonds completely issued and in the hands of *bona fide* holders under the law merchant. In this case no currency as commercial paper has been given these bonds. See Young vs. Clarendon Township, 132 U. S., 353.

This question of bonds issued or debt incurred in excess of the Constitutional limit has often been before the Su-
70 preme Court of the United States. The question generally was as to the effect of recitals in the bonds as constituting estoppel against the municipality in favor of innocent holders for value. These cases sustain and illustrate the contention of respondent.

Dixon County vs. Field, 111 U. S., 83. This was a suit to recover overdue coupons on bonds issued by Dixon County. The defense was that the amount of the bonds issued exceeded "ten per cent. of the assessed valuation of
71 the County," as limited by the Nebraska constitution. The holders contended that the county was estopped by the recitals in the bonds. This Court held the bonds to be void, saying:

"No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount fixed by reference to that record that is made
72 by the constitution the standard for measuring the limit of

municipal bonds. * * * The fact, as it is recorded in the assesment itself, is extrinsic and proves itself by inspection, and concludes all determinations that contradict it."

In this case the assessment was made in the spring of 1875, and continued in force until the spring of 1876. The bonds were issued May 16, 1876. Bonds were held void because the amount $87,000 exceed ten per cent. of the last preceding assessment.

In Buchanan vs. Litchfield, 102 U. S., 278, bonds were 73
held void because in excess of the limit. The Court said :

"That the purchaser of the bonds was certainly bound to take notice not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessment disclosed concerning the valuation of taxable property within the city for the year 1873."

This was a suit by a bond holder of coupons. The bonds 74
were issued January 1, 1874. The assessment which controled was the assessment for the year 1873.

It is true that the constitution under which the above case was decided provided the limit to be, "five per cent. on the value of the taxable property within such county or corporation to be ascertained by the last State and county tax lists previous to the incurring of such indebtedness."

The case of Nesbit vs. Independent District of Riverside, 75
9 Sap., Ct. Rep. 144, U. S., was decided under the constitution of Iowa, containing a provision similar to the Colorado constitution above. In this last named case the Supreme Court of the United States held that under the Statutes of Iowa in force in 1872 and 1873, regulating the assessment of property for the purpose of State and county taxation, the lists thereof could not be completed before the month of August, 1873, and when the bonds were issued March 27, 1873, the last computed tax list was for the year 1872 and 76

that consequently the bonds were void, because in excess of the constitutional limit, based upon the assessment of 1872, and that the incompleted assessment of 1873, could not be considered in determining the question, notwithstanding the bonds were issued in 1873. So in the case of Wilkerson vs. Van Orman, 70 Iowa, 230 the Iowa court held:

"Whether the indebtedness incurred by the issuing of
77 school house bonds will exceed the five per cent. limit (Iowa Constitution, Art. 11, Sec. 3) must be determined from an examination of the tax lists, which are not made for any year until after the equalization by the County Board in June, and are not completed until after the levy of the taxes in September. Hence where bonds voted on May 16th, 1885 would be in excess of the five per cent. limit estimated on the list of 1884, their immediate issue was properly enjoined, although estimated upon the assess-
78 ment rolls for the year 1885, filed before the date of the vote aforeraid, the bounds would not be in excess of the constitutional limit."

It is suggested that decisions under constitutions similar to that of Iowa are not in point, since the Iowa constitution expressly fixes the official assessment next preceding the incurring of the debt as the test, whereas the South Carolina Constitution does not.

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But we contend that the expression "assessed value of all the taxable property" in the South Carolina constitution means precisely the same as the expression "value of the taxable property * * * to be ascertained by the last State and County tax lists," in the Iowa Constitution. In fact the Supreme Court of South Carolina in State vs. Cornwell, 18 S. E. Rep. 186, already cited has substantially so held in these words: It (meaning the expression
80 "assessed value") must be regarded as meaning the value

placed upon property for the purpose of taxation by officials appointed for that purpose. In all this, reference is had to the past and not to the future—to an assessment already made and completed and entered upon the proper record. The word "assessed" in the constitutional provision, being in the past tense implies the same thing."

We think the Circuit Court committed no error in dismissing the Bill and that its decree on the merits is sustained by both reason and authority.

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IRA B. JONES,
FOR RESPONDENT,

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